A STUDY OF THE LAWS AND REGULATIONS ON INSIDER TRADING IN MALAYSIA

by

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SYNOPSIS

Insider trading is an offence under the Securities Industry Act, 1983 (Act 280) and the Companies Act, 1965 (Act 125) but it is difficult to prosecute in a criminal court.

This thesis considers an overview of the laws on insider trading in the Securities Industry Act, 1983 when a person is charged as an insider and when he deals directly, or indirectly in securities. The elements of actus reus and the mens rea of the person should be clearly elaborated in the Securities Industry Act. However in the present state of the laws, the elements of actus reus and mens rea in the offence of insider trading are not adequately defined in section 89 and section 90 of the Securities Industry Act 1983.

The words "improper use" in section 89(1) of the Securities Industry Act 1983 is not defined in the Securities Industry Act, nor has it been subjected to judicicial interpretation. It is not certain how the words should be defined from the viewpoint of the issuer, and the investing public. The word "information" has been referred to as specific, confidential, unpublished, price sensitive, and if

generally known to the public, might reasonably be expected to affect materially the price of the subject matter of the dealing on the stock exchange under section 89 of the Securities Industry Act 1983. Yet, for each aforesaid words which described the nature of information required under the Securities Industry Act 1983, such words are not defined in the Securities Industry Act 1983, though subject to judicial interpretation.

The most effective remedy to prevent and minimise the incidence of insider trading by the authorities and the self-regulatory authority ie. the Kuala Lumpur Stock Exchange, is the mandatory public disclosure of the particulars relating to dealings in securities on the Stock Exchange. Under section 45 of the Securities Industry (Central Depositories) Act, 1991 (Act 453) disclosure of particulars relating to dealings are not permitted except with the approval of the Minister of Finance on the ground of public interest. It is pertinent to amend Section 45 of the Securities Industry (Central Depositories) Act 1991 to enable any person who dealt in listed transferable securities, and was aggrieved by insider dealing, to have access to such data on the dealings in securities.

No doubt the laws on insider trading are contained in section 89 and section 90 of the Securities Industry Act 1983, but the most powerful weapon against the issuer for any offences committed under the securities industry law is the enforcement of the laws under section 87A of the Securities Industry Act 1983.

The Securities Commission has recently charged Chua Seng Huat, the managing director of a public listed company, Kim Hin Industry Berhad for insider trading under section 89 and 90 of the Securities Industry Act 1983 in the Sessions Court in Kuching in the state of Sarawak.

In the Securities Commission Report of 1996 released on the 10th June 1997, the Securities Commission intends to push for more recognition on the civil remedies such as restitution and disgorgement of gains for any violations of the securities laws.

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CHAPTER 1

INTRODUCTION

Malaysia is a developing country. In the development of its economy towards industrialisation, it requires a lot of capital investments. Under the Seventh Malaysia Plan of Malaysia for the year 1997 to 2002, an estimated Malaysian Ringgit of 535.6 billion of gross investment will be required to achieve its objectives under the Plan. The bulk of the funds to support the growth of the economy will be derived from the equity issues, and debt securities. Equity issues have increased its share of the capital market by four percent (4%) to fourteen percent (14%) and the share of debt financing was maintained at thirty eight percent (38%) of the capital market. The authorities involved in the capital market, will protect the investors by ensuring that they place surplus funds in the capital market without undue loss in their asset value, by formulating sound macroeconomic policies and comprehensive regulatory frameworks so as to reduce their risks in dealings in securities.[1] To provide a good regulatory framework, the laws relating to securities should be adequate, enforceable and certain to undermine all malpractices in the securities industry, and to prevent

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[1] Bank Negara Annual Report 1996.

offences such as insider trading and manipulation. The laws on insider trading in the securities market are found in the Companies Act 1965[2] and the Securities Industry Act 1983.[3] The present laws on insider trading in the Companies Act 1965 and the Securities Industry Act 1983 have been subject to minor amendments but the provisions of the laws remain vague in view of the fact that the courts have not had the opportunity to interpret them.

1.1 Objectives

The intention of this thesis is to present an overview of the laws on insider trading in the market for securities, in particular the laws contained in the Securities Industry Act 1983 and the Companies Act 1965. A detailed study of the self-regulatory measures adopted by the Stock Exchange to curb insider trading will be undertaken to assess its effectiveness in the light of existing developments in the securities market. It is evident that both the regulatory and self-regulatory authorities have to play a complementary and/or supplementary role to curb insider trading in the securities market.

This thesis deals with a comprehensive study of

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2 Act 125.

3 Act 280.

the securities law on insider trading in Malaysia, both statutory and non-statutory. A comparative study is made with the insider trading laws in the Corporations Law 1991 in Australia to study the weakness in the laws on insider trading in Malaysia. The reason is that the laws in insider dealing in Australia are to a certain extent in pari materia with the laws in Malaysia. Both countries adopt the common law system of administration of laws. In Australia, the laws on insider trading under the Corporations Laws has superimposed the concept of fiduciary relationship-the company law approach with the "market oriented approach", whereas in Malaysia, the laws still emphasise on the concept of fiduciary relationship-company law. It may be relevant and, if, proved to be beneficial to Malaysia in the long term, to streamline the Malaysian laws in line with the Australian laws on insider trading to meet the future needs of a developed economy.

1.2 Outline of Study

This thesis is divided into several chapters, and each chapter deals with a specific area of study.

Chapter 2 deals with the offence of insider trading in the Securities Industry Act 1983, the Companies Act 1965, and the Malaysian Code On Takeovers & Mergers. The meaning of the main elements in the offence of insider

dealing such as insider, insider dealing, information, securities, losses, defence and lastly, penalties will be examined in detail. A comparative study will be made with the like elements in the laws of insider trading in Australia. The laws of other jurisdictions such as the European Economic Community, the United States of America and England are referred to from time to time to provide a better understanding of the definition of the various elements in the offence of insider trading.

In Chapter 3 the self-regulating measures of the Stock Exchange against the members of the exchange and of the issuer in curbing insider dealing are discussed and critically reviewed. The specific provisions on the misconduct of the members relating to their business practices in the Rules Relating To Member Firms And Member Companies, and the provisions in the Rules For Trading By Member Firms And Member Companies on improper practices in their dealings are commented upon in this chapter. As for the issuer, the role of the Stock Exchange to prevent incidence of insider trading in the securities market through the self-enforcement of the Stock Exchange's insider trading policy by the issuer, such as, through the disclosure of information, withholding of information, and the purchase of securities by the insiders are also dealt with.

The role of the Securities Commission and the Registrar of Companies in enforcing the law on insider trading is the subject of Chapter 4. The Securities Commission's powers under the Securities Commission Act 1993[4] relating to its investigation and prosecution of the securities laws on insider trading and its preventive actions to minimise insider trading are commented in this chapter. The effectiveness of the Registrar of Companies' role in enforcing the laws relating to the prospectus of the listed issuer and its updates on the material information supplied or to be supplied by the issuer in the context of the disclosure-based regulatory framework of the Securities Commission are also reviewed critically in this chapter.

Chapter 5 deals with the proposals for reforms to the laws. A new regulation on insider trading known as "The Prohibition Of Insider Trading Order" is proposed to be enforced by the Securities Commission, and a set of audit rules to control the dealings in securities by the insiders be formulated for the Audit Committee of each issuer.

1.3 Research Methodology

The research material for the whole thesis

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[4] Act 498.

comprises references to local and foreign, textbooks, journals, law reports, seminar papers and acts of parliaments.

There is no Malaysian case law on insider trading. Certain questionnaires on insider trading were forwarded to the directors of public listed companies to assess their understanding of the laws on insider trading, but the response to the questionnaires was poor. It is not possible to undertake an empirical study on the effectiveness of the rules of the stock exchange in dealing with insider trading as most of the information required for the study is classified by the Stock Exchange and the Securities Commission as confidential.

Interviews were conducted with the officials of both the Kuala Lumpur Stock Exchange, the Securities Commission and the Registrar of Companies' Office to gain a better understanding of the workings of the machinery, both self-regulatory and regulatory, in the enforcement of the self-regulations and regulations on insider trading.

1.4 Nature of the Securities Industry

In Malaysia there is a primary market for securities where securities are issued and listed for

subscription through initial listing, and a secondary market for securities where listed securities are traded freely and openly by the public.

As mentioned earlier the securities industry in Malaysia is governed by the securities regulation and self-regulation. The underlying objective of the regulations is to protect the integrity of the capital market by ensuring that the investor make informed investment decision in their dealings in securities ; to preserve the investors' confidence in the capital market by ensuring the irregularities in the capital capital market are reduced and eventually eradicated; and also to ensure the growth of a healthy and orderly capital market.

The aim of the laws on insider dealing is "to protect corporate confidence and to prevent insiders privy to such confidences from benefitting from an unfair advantage when they deal in the securities market. When they do deal in those circumstances, they abuse their position and confidences reposed in them which, in turn, undermines the integrity of the market." *Public Prosecutor v Allan Ng Poh Meng*.[5]

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[5] [1990] 1 MLJ v per Senior District Judge EC Foenander at p. xiv.

The Legislations which govern the securities industry are as follows:-

(a) Companies Act 1965;

(b) Securities Industry Act 1983;

(c) Securities Commission Act 1993;

(d) Securities Industry (Central Depositories) Act 1991;

(e) Penal Code;[6]

(f) Trustee Act 1949;[7]

(g) Civil Law Act 1956;[8]

The securities industry is under the supervision and management of five (5) regulatory bodies as follows:-

(a) The Securities Commission;

(b) The Registrar of Companies;

(c) The Licensing Officer of the Ministry of Finance;[9]

(d) The Foreign Investment Committee;

(e) The Stock Exchange;

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6 F.M.S. Cap. 45.

7 Act 208.

8 Act 67.

9 The powers of the Licensing officer in the issuance of licences to the intermediaries in the securities market have been assumed by the Securities Commission.

The Securities Commission is set up under the Securities Commission Act 1993, and is vested with powers to enforce the laws on securities.

The Registrar of Companies enforces the Companies Act 1965.

The Licensing Officer in the Ministry of Finance regulates the issuance of licences to the dealers, dealers' representatives and investment advisers under the Securities Industry Act 1983.

The Foreign Investment Committee implements the guidelines formulated by the Government on the acquisition of assets, interests, mergers or takeovers of companies and businesses by foreign concerns. This includes inter alia, any proposed acquisition of assets or interests exceeding RM 5 million in value whether by Malaysian or foreign concerns, and any acquisition of 15% or more of the voting rights in a Malaysian company.

The Stock Exchange that is the Kuala Lumpur Stock Exchange is governed by its own memorandum of association and articles of association. The workings and machinery of the Kuala Lumpur Stock Exchange are governed by two (2)

sets of rules namely:

(a) Rules Relating to Member Firms and Member Companies; and

(b) Rules For Trading by Member Firms and Member Companies;

The Kuala Lumpur Stock Exchange oversees the market for securities in a self regulatory capacity by enforcing the Listing Requirements of the Kuala Lumpur Stock Exchange Main Board and the Listing Requirements of the Kuala Lumpur Stock Exchange Second Board, ex-ante listing and ex-post listing.

THE REGULATORY BODY AND THE SELF-REGULATORY BODY OF THE SECURITIES MARKET UNDER THE SECURITIES LAWS

MINISTER OF DOMESTIC TRADE & CONSUMER AFFAIRS

REGISTRAR OF COMPANIES

Companies Act 1965

MINISTER OF FINANCE

SECURITIES COMMISSION

Securities Commission Act 1993

Code of Takeovers And Mergers

Securities Industry Act 1983

Securities Industry (Central Depositories) Act 1991

KUALA LUMPUR STOCK EXCHANGE

(SECURITIES CLEARING AUTOMATED NETWORK SDN.BHD. [SCANS])

(MALAYSIAN CENTRAL DEPOSITORY SDN.BHD. [MCD])

Memorandum of Association

Articles of Association

Rules Relating to Member Firms and Member Companies

Rules For Trading By Member Firms and Member Companies

Listing Requirements

Member Firms and Member Companies

Issuers

Participants

CHAPTER 2

INSIDER TRADING

2.1. The Meaning of Insider Trading

Insider trading occurs in a particular transaction when a person buys or sells securities, whilst in possession of price sensitive information relating to the securities in question. He obtained the price sensitive information from his direct or indirect connection with the issuer of the securities concerned.

Insider trading may connote trading in the securities of a particular company by its insiders. The phrase is often intended to mean only the improper trading by such person, when he purchases or sells securities in order to make a profit or avoid a loss, when he is in possession of confidential information that will affect their value when the information become public. Insider trading is essentially a problem of non-disclosure. A person whose position provides him with access to information that indicates a disparity between the value of a corporation's securities and the price at which they may be acquired, or disposed of, acts on the information before it becomes available to those with whom he trades, in order to obtain for himself, without risk, the benefit of his early knowledge.... The general

purpose of securities legislation is to enhance the efficiency of trading markets in order to encourage investors to provide funds to primary users by purchasing securities. Insider trading may undermine those goals by discouraging investment at both levels. Investors may be reluctant to invest in a company whose insiders are reputed to trade on confidential information, and they may be less willing to invest in securities generally because their confidence in the market's integrity has been diminished.... While the fiduciary concept provides a useful starting point, it requires supplementation to complete even the definitional task. Because they derive information from a position of trust that gives them an advantage over their ultimate beneficiaries, directors and officers are easily treated as owing fiduciary obligations to existing shareholders. A slight extension of the principles is required to encompass transactions with non-shareholders that is, sales, and to impose obligations on controlling shareholders who do not participate formally in the management of the company but who do have access to confidential information.... The concept of 'equal access to information' that is, that all investors are entitled to have equal access to information that is likely to affect their investment decision making, is sufficiently broad to include all such persons and also relates to the goals of market efficiency and investors protection.... In short,

information obtained through a position or relationship with a company, or in the market which, because it is not available to others, enables a person to engage in essentially riskless transaction in securities is usually sufficient to disentitle him from trading.[1]

Insider trading is defined under section 340(3)(b)(i) of the Listing Requirements (Main Board) of the Kuala Lumpur Stock Exchange as the purchase or sale of company securities, puts,[2] calls,[3] or other options with respect to such securities. Trading in securities or options is deemed to be done by an insider whenever he has any beneficial interest or option, regardless of whether those rights or interests are actually held under his name.

Under section 340(3)(b)(iii) of the Listing Requirements (Main Board) of the Kuala Lumpur Stock Exchange insider trading is defined to include tipping

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[1] Professor Anisman in the Australian National Companies And Securities Commission Discussion Paper titled "Insider Trading Legislation For Australia: An Outline of the Issues And Alternatives 1986."

[2] Put means a contract to sell a specified quantity of stock at a fixed price for a stipulated period of time.

[3] Call means a contract purchased for a premium entitling the holder at his option to buy from the vendor on or before a fixed date a specified member of shares at a predetermined price.

or, revealing inside information to outside individuals, to enable such individuals to trade in the company's securities on the basis of undisclosed information.

Three theories exist behind the laws on insider trading such as:-

(a) the fiduciary duty theory;

(b) the misappropriation theory;

(c) the equal access theory.

Under the fiduciary duty theory those persons having fiduciary relationship with the company are not supposed to engage in a position of conflict, and to make a profit by any dealing in the securities of the company.[4]

In *Chiarella v United States*[5] the Supreme Court stated that the "disclose or refrain provision" of rule 10b-5 under section 10(b) of the Securities Exchange Act 1934 is limited to cases where the insider-trader owes a disclosure duty based on a pre-existing relationship of trust and confidence, or in which the trader is an agent or a fiduciary to the complaining party.

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4 See Percival v Wright [1902] 2 Ch.421.

5 445 U.S.222.

However in other cases where the parties are not in a fiduciary relationship, the courts have inferred a relationship of trust and confidence based on the special facts of the case. In a New Zealand case of *Coleman v Myers*[6] the court held that under the special circumstances of the case, the directors may owe duties to the shareholders not to mislead them, and to disclose all material information to them. In an American case of *Strong v Repide*[7] the court held that where the officers of the company have knowledge of the company by virtue of being officers of the company, or from the nature of his or her dealings with the shareholders, then based on the special facts of the case, they are under a fiduciary duty to the shareholders. They should make available to the shareholders, all material and non-public information with respect to those securities. In a English case of *Allen v Hyatt*[8] the court held that where officers of the company held themselves out as willing to act as agents for shareholders, then they may be considered fiduciaries.

Under the misappropriation theory, any person who trades on non-public information acquired by theft, or a breach of a duty of confidentiality misappropriates

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6 [1977] 2 NZLR 225.

7 213 U.S. 419 (1909).

8 (1914) 30 TLR 444.

corporate information. In *Carpenter v United States*[9] a Wall Street Journal reporter provided stockholders with information that was to appear in Wall Street Journal newspapers column. He misappropriated material non-public information when he breached a duty arising from a relationship of trust and confidence to his employer by revealing information which belonged to the newspaper company.[10]

The equal access theory mandates all participants should have equal opportunity to obtain and evaluate the information relevant to their investments and trading decisions. All traders owe a duty to the market either to disclose or to refrain from trading on non-public information. Policy considerations aside, the basis for this duty is said to be the 'inherent unfairness of exploiting an erodable informational advantage, that is, confidential information from which other traders are legally excluded.[11] All insiders

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[9] 91 F.2d 1024 (2nd Cir.1986), aff'd,108 S.Ct.316 (1987).

[10] Kim Lane Scheppele noted in footnote 3 of his paper "It's just not right": in 'The Ethics of Insider Trading' in vol. 56 L & CP 123, that based on the view of the Supreme Court in *Carpenter v United States*, 484 U.S.19 (1987) and the dicta in *Chiarella* and *Dirks*, the court might be willing to think of those securities fraud as a fraud on the source of information rather than fraud on the holder of the security.

[11] See Brudney, 'Insiders, Outsiders and Informational Advantages under the Federal Securities Laws.' (1979) 93 Harv.L.Rev. 322, 346.

should not be allowed to derive a benefit from using the information which is not available, whether by research or analysis, to other investors, but would affect the investment decision of the later if it were. In its unqualified form, the equal access theory implies a wholesale allocation of trading rights in non-public information to investors at large, except where informed traders earn an exclusive right to private information, the hard way, through their own research and analysis.[12] In *Cady, Roberts & Co.*[13] the Commission relied on two principal element i.e.

'[F]irst, the existence of a relationship giving access, directly or indirectly, to information intended to be available only for a corporate purpose, and not for the personal benefit of anyone, and second, the inherent unfairness involved where a party takes advantage of such information, knowing it is unavailable to those with whom he is dealing.'

However the Supreme Court in *Chiarella v United States*[14] rejected the equal access theory and held that the printer had acquired the information not from the target companies, Therefore he had no

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12 See Reiner Kraakman in the 'The Legal Theory of Insider Trading Regulation in the United States' cited at page 41 in the European Insider Dealing, Law And Practice edited by Klaus J.Hopt & Others. London, Butterworth 1991.

13 40 SEC 907 (1961).

14 Supra note 5.

connection with the target shareholders and thus he was under no duty to disclose.

To understand insider trading, one has to analyse information from the economics point of view and the contractual perspective on the allocation of property rights to information, if any, between the principal-agent and/or shareholders and managers[15], and whether the unfettered operation of the market will lead to the optimal production and allocation of information which may affect the value of the assets of the company.

It is evident that information cannot be classified as "property" with the concept of property and, since it is not movable property[16], it also cannot be stolen by a third party.

Under the common law the recipient's liability for unauthorised access or use of inside information depends on his relationship with the issuer of information. In *Oxford v Moss*[17] the court held that the acquiring of an examination paper by a student and the 'information' contained therein did not constitute

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15 Whether there should be an action in rem through a claim by the issuer for its proprietary right in information is still debatable.

16 See section 22 Penal Code in 'illustration' on movable property. It refers to writings, relating to real or personal property or rights.

17 [1979] Crim.Law Rev.119.

theft. An issuer may file an action in contract, based on the breach of confidence, an express trust or on his fiduciary obligation. Whereas under the American jurisdiction, information is treated as an economic good. In Malaysia the basis of the defendant's obligation to the issuer depends on the contract or his relationship with the issuer, rather than treating information as a good having a proprietary interest, which is enforceable against all persons. It is submitted that in an era of information technology it may be appropriate that inside information, may it, confidential information, trade secret or official secret, should be accorded proprietory right under the law to prevent unauthorised access or use of information.

The concept of separate legal entity and the doctrine of privity of contract fail to provide a basis for the relationship between the shareholder/participant and the insider for an offence of insider dealing. What is the juristic basis on which an insider is held liable to a shareholder or a participant for insider dealing? Under the common law courts, the courts have applied the consensual theory or, in equity, based on an obligation to act in good faith. Whereas in the American jurisdiction, it was implied to be a fraud on the market. It is submitted that it may be worthy of consideration to analyse the relationship between the

insider and the shareholder, ex-post or ex-ante, and determine its relationship as an exemption to the doctrine of legal entity, and to find whether fraud did exist in the market with all the market distortions such as nondisclosure of material information by the issuer and the non-disclosure of dealings to the participants.

2.1.1 Insider Trading Under Section 89 of the Securities Industry Act 1983

Section 89(1) of the Securities Industry Act 1983 provides that:

" An officer, agent or employee of a corporation, or officer of a stock exchange, who is or in relation to a dealing in securities of the corporation by himself, or any other person makes improper use to gain, directly or indirectly, an advantage for himself or any other person, of specific confidential information acquired by virtue of his position as such officer, agent or employee or officer of the stock exchange which if generally known might reasonably be expected to affect materially the price of the subject matter of the dealing on a stock exchange shall, in addition to any penalty imposed under section 91, be liable to a person for loss suffered by the person by reason of the payment by him or to him of a consideration in respect of the securities, greater or lesser, as the case may be, than the consideration that would have been reasonable if the

information had been generally known at the time of the dealing".

Section 132A of the Companies Act 1965 also deals with insider trading and this section is in parimateria with section 89 Securities Industry Act 1983, except for the penalty provision which provides for a term of imprisonment for five years or thirty thousand ringgit or both. The penalty for any conviction under section 89 is a fine not less than one million ringgit and to imprisonment for a term not exceeding ten years.[18]

Under section 89(1) of the Securities Industry Act 1983 the person who is involved in an insider trading may be related to an issuer such as an officer, an agent or an employee of the issuer, or a person who is not related to the issuer such as an officer of a Stock Exchange.

The phrase "in relation to" may imply that the insider may deal directly or indirectly in securities through a third party. When an insider deals directly in securities, he should have the intention to make use of the information to deal in securities. This shows that mens rea should exist in the offence.[19] Mens rea is

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[18] See section 90 of the Securities Industry Act 1983.

[19] *Lim Chin Aik v Regina* [1963] MLJ 50 Privy Council.

a defined state of mind in relation to the causing of the event. A person's state of mind refers to his knowledge, intention, opinion, belief or reasons. Wright J.observed in *Sherras v De Rutzen* [20] that there is a presumption that mens rea, an evil intention, or a knowledge of the wrongfulness of the act, is an essential ingredient in every offence; but that presumption is liable to be displaced either by the words of the statute creating the offence or by the subject matter with which it deals, and both must be considered.

In *Tan Joo Cheng v Public Prosecutor*[21] the Court of Criminal Appeal held that intention is a matter of inference. In *Gurcharan Kaur v Rochi Silk Store*[22] Thomson CJ. referred to the words of Asquith LJ. in *Cunlife v Goodman* [1950] 2 KB 237 on intention at page 253. " The question to be answered in whether the defendant (on whom the onus lies) has proved the plaintiff... 'intended' to pull down the premises on this site. This question is a question of fact. If the plaintiff did no more than entertain the idea of this demolition, if she got no further than to contemplate it as a (perhaps attractive) possibility, then one would have to say (and it matters not which way it is put)

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20 [1895] 1 QB 918.

21 [1992] 1 SLR 620.

22 [1959] MLJ 229 at 231.

either that there was no evidence of a positive 'intention' or the word 'intention' was incapable as a matter of construction of applying anything to tentative and so indefinite. An 'intention' to my mind connotes a state of affairs which the party 'intending'...does more than merely contemplate: it connotes a state of affairs which, on the contrary, he decides, in so far as in him lies, to bring about, and which, in point of possibility, he has a reasonable prospect of being able to bring about, by his act of volition." In *Chew v R*[23] the court stated that to prove that "to gain directly or indirectly an advantage for himself, or for any other person, or to cause detriment to the corporation" in section 229(4) of the Companies (WA) Code,[24] it is necessary to establish that the accused intended that a result would ensue and that the accused believed that the intended result would be an advantage to himself.

An insider should have direct or indirect access to the inside information before he is deemed to be in possession of inside information with the requisite knowledge that the information is the inside

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[23] 7 ACSR 481.

[24] Under section 229(4) of the Companies (WA) Code an officer or employee of a Corporation shall not make improper use of his position as an officer or employee, to gain directly or indirectly, an advantage for himself or for any other person or to cause detriment to the corporation.

information. In *Roger v Taylor's Central Garages*[25] Devlin J. elaborated on the degrees of knowledge."...There are, I think, three degrees of knowledge which it may be relevant to consider in cases of this kind. The first is actual knowledge, which the justices may find because they infer it from the nature of the act done, for no man can prove the state of another man's mind; and they may find it even if the defendant give evidence to the contrary. They may say, 'We do not believe him, we think that this was his state of mind'. They may feel that the evidence falls short of that, if they do, they have then to consider what might be described as knowledge of the second degree; whether the defendant was, as it has been called, shutting his eyes to an obvious means of knowlege. ...I do not think it necessary to look further, certainly not in cases of this type, than the phrase which Lord Hewart C.J. used in a case under this section, *Evans v Dell*(1937) 53 T.L.R.310, where he said (at p.313): '...the respondent deliberately refrained from making enquiries, the result of which he might not cause to have.' The third kind of knowledge is what is generally known in law as constructive knowledge: it is what is encompassed by the words 'ought to have known' in the phrase 'knew or ought to have known'. It does not mean actual knowledge at all; it means that the defendant had in effect the means of knowledge. When, therefore the case of the prosecutor

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25 [1951] 2 T.L.R. 284.

is that the defendant failed to make what they think were reasonable inquiries it is, I think incumbent on them to make it plain which of the two things they are saying. There is a vast distinction between the state of mind which consists of deliberately refraining from making inquiries, the result of which the person does not care to have, and a state of mind which is merely neglecting to make such inquiries as a reasonable and prudent person would make. ...The case of shutting the eyes is actual knowledge in the eyes of the law: the case of merely neglecting to make inquiries is not knowledge at all-it comes within the legal conception of constructive knowledge, a concept which, generally speaking, has no place in the criminal law.

When an insider is in possession of inside information,[26] he may or may not have intention to make use of the inside information. It is up to the prosecution to prove that he has the intention to make use of the information and did make use of the inside information.

Clause 35(5) of the Criminal Justice Bill of 1992 provides that a person who has inside information to deal in price affected securities in relation to the

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[26] See section 165 of the Evidence Act 1950 (Act 56) which states that when any fact is especially within the knowledge of any person, the burden of proving that fact is upon him.

information shall be presumed to take advantage of the information. It will be for the defendant to overturn that presumption on a balance of probabilites.[27] In *Public Prosecutor v Yuvaraj*[28] a Privy Council case, the court held that the onus of proof in a criminal proceeding was on the defendant to disprove a presumption arising from the existence of facts, and that the standard of proof was the same as that applicable to civil proceedings ie. on the balance of probabilities.

When an insider deals indirectly in securities, he may encourage, or procure a secondary insider [or a tippee][29] to deal in securities by disclosing the information to him. Unless the tippee is deemed to obtain insider information from the insider, it is difficult to establish the causal link that an insider has disclosed insider information to the tippee, to enable the tippee to deal in the securities.[30]

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27 Tony Woodcock in Insider Dealing: the Future Sol. Journal November 6th 1992.

28 [1969] 2 MLJ 89.

29 'Tippee' refers to a person who is not an insider but has learned non-public information from a company insider : See *Shapiro v Merrill Lynch, Pierce, Fenner & Smith Inc.* 73-74 CCH Fed.Sec L.Rep.para 94,473(3d Cir 1974).

30 See section 114 of the Evidence Act 1950 whereby the court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct, and public and private business, in their relation to the facts of the particular case.

However in drawing presumption of facts in the circumstances of any case, the presumption of facts must not be drawn automatically or, as it were, by the rule of thumb, without first considering whether in the circumstances of each particular case, there were adequate grounds to justify any presumption being raised.[31] The insider must have the requisite mens rea, that is, he knows, or have reasonable cause to believe that the tippee would deal in the securities by making use of the information. What is the degree of knowledge required from a tippee, a third party, who knowingly participates in a director's improper use of the inside information?

In *Baden Delvaux & Lecuit v Societe Generale etc*[32] the court distinguishes the degree of knowledge as actual knowledge, wilfully shutting one's eyes to the obvious, wilfully and recklessly failing to make enquiries as an honest and reasonable man would make, knowledge of circumstances which would indicate the facts to an honest and reasonable man, and knowledge of circumstances which would put an honest and reasonable

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31 Ong J. in *Mohamed Ali v Public Prosecutor* [1962] MLJ 230 in a case when the court deliberated on the presumption of facts under section 114 of the Evidence Act 1950.

32 [1992] 4 ALL ER 161 at 235.

man on enquiry.[33]

In *Dirks v SEC*[34] the Supreme Court held that a tippee was liable for insider trading when he traded on inside information with an improper motive, and when the tippee knows or has reason to know that the insider had disclosed inside information to him.

Section 89 (1) of the Securities Industry Act 1983 does not provide for the mens rea and the actus reus of the insider when he communicates the inside information to a tippee to deal in securities.

When an insider deals in securities he makes improper use of information. The word "improper" is not defined in the Securities Industry Act . Does it mean illegal or contrary to law or contrary to normal business practices? In the Oxford Dictionary[35] "improper" is defined as "unseemly, indecent, inaccurate or wrong". Under section 340(2)(a)(b) of the Listing Requirements (Main Board) of the Kuala Lumpur Stock Exchange it is stated that the price sensitive information is withheld by the issuer for corporate use and not for personal use. It appears that "use" other

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33 See also note 25 *Roger v Taylor's Central Garages.*

34 463 U.S. 646 (1983).

35 Current English Eighth Edition 1992

than "an authorised corporate use" may constitute "improper use." Lord Greene M.R. in *Saltman Engineering Co. Ltd and Others v Campbell Engineering Co. Ltd.*[36] stated that "unauthorised use" mean "use" or "disclosure".

In *Grove v Flavel* [37] the Supreme Court of South Australia held that it was a breach of Section 124(2) of the Companies Act 1962 (SA) for a director who knows that his company had liquidity problems and a lack of bank finance, to arrange for the disposition of its assets to the prejudice of external creditors, but to the advantage of internal creditors. The use of the information was improper because of his failure to consider the interests of creditors generally. The court observed that the word "improper " is not a term of art. It is to be understood in its commercial context to refer to conduct which is inconsistent with the proper discharge of the duties, obligations and responsibilities of the officer concerned.

It appears that there must be conscious use of the insider information by an insider before an insider may be held liable for insider dealing.

The information relating to that specific

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[36] [1963] 3 All ER 413, at 414.

[37] (1986) 11 ACLR 161.

issuer is specific, confidential and if generally known might reasonably be expected to affect materially the price of the subject matter of the dealing on a stock exchange under section 89 of the Securities Industry Act 1983.

As a result of his dealing in securities he gained an advantage for himself or for any other person.

To gain an advantage may mean that he has made a profit or avoided a loss.[38] Is the purpose of the person dealing in securities with inside information relevant? If the law were to prohibit the use of inside information to gain an advantage the prosecution would face a difficult task in court.[39]

A person who contravences or fails to comply with section 89(1) of the Securities Industry Act 1983 commits an offence and is liable on conviction to a fine of not less than Malaysian ringgit one million ringgit and to imprisonment for a term not exceeding ten years.

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[38] It is not very clear whether an insider who sells shares on the basis of inside information which he has acquired by virtue of his position is liable to account if he sells in order to avoid a loss. See Hammigan, Insider Dealing (Kluwer, London, 1988).

[39] HAJ Ford & Professor RP Austin Principles of Company Law (Sydney,Butterworth 5th edition).

An insider shall be liable for any losses suffered by the other party who dealt at the opposite end of the transaction concerned. It is questionable whether he is liable for the losses suffered by those persons who traded contemporaneously with the insider in the securities concerned.

The insider has a defence against any action brought by a person who has suffered losses caused by his dealing in securities, if the other party who suffered losses, has knowledge of the information, or ought reasonably to have known of the information before he entered into the transaction.

Any person whose losses are brought about by an insider dealing, must commence civil proceedings to recover the losses within two years from the date of completion of the transaction in question.[40]

2.1.2 Insider Trading Under Section 90 of the Securities Industry Act 1983

Section 90 of the Securities Industry Act 1983 provides that:

" Any person, who is or in relation to dealing in securities of a corporation, has any information which if generally known might reasonably be expected to

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40 Infra paragraph 2.6 on losses.

affect materially the price of the subject matter of the dealing on a stock market and which -

(a) he holds by virtue of his official capacity or former official capacity;

(b) it would be reasonable to expect a person in his official capacity or former official capacity not to disclose except for the proper performance of the functions attaching to that official capacity; and

(c) he knows is unpublished price-sensitive information in relation to securities of the corporation,

shall not make improper use of such information to gain, directly or indirectly, an advantage for himself or for any other person and any person who contravenes or fails to comply with the provisions of this section commits an offence.

Section 90 is in parimateria with section 132B of the Companies Act 1965 except for the penalty provision under section 132B which provides for an imprisonment for five years or thirty thousand ringgit or both, whereas the penalty provision for a conviction under section 89 is a fine not less than one million ringgit and to imprisonment for a term not exceeding ten years.

Section 90 relates to the prohibition on abuse of information obtained by officials in official

capacity. Under this section, the insider may be an official or former official who possesses information which is unpublished price sensitive information, and if generally known might reasonably be expected to affect materially the price of the subject-matter of the dealing on a stock exchange. When he deals directly, or indirectly in securities he makes improper use of the information to gain an advantage for himself or for some other person. He is expected not to disclose the information except for the proper performance of his duties as an official.

It is worthy of note that the element of actus reus and mens rea of the official's indirect act of insider dealing is not mentioned in the section. Hence it is extremely difficult to prove the case of insider trading under this provision in court. Under this section there is no stated defence for an official or former official nor is he liable for any losses suffered by the person at the opposite end of the transaction.

2.1.3 Insider Trading Under Section 132(2) of the Companies Act 1965

Section 132(2) of the Companies Act provides that :

"An officer or agent of a company or officer of the Stock Exchange shall not make improper use of any

information acquired by virtue of his position as an officer or agent of the company or officer of the Stock Exchange to gain directly or indirectly an advantage for himself or for any other person or to cause detriment to the company.

Under Section 132(2) of the Companies Act 1965 an insider may be an officer, agent or officer of the Stock Exchange. He shall not directly, or indirectly make improper use of the information to gain an advantage for himself or for some other person. Unlike the earlier provisions of the law on insider trading, here the term "information" is defined as "any information", and is not confined to information which specific, confidential, or price sensitive. An insider shall be liable to the issuer for any profit made by him or any damage suffered by the company.[41]

Under the common law, the directors and officers of the company, have to discharge the fiduciary duties of acting in good faith, to exercise skill and care, to exercise their powers for a proper purpose and

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41 There is no reported decision in Britain on a claim by a company to recover insider trading profit from an insider. Hence the issue of whether insider are accountable to their companies for such profit is unresolved. Jacqueline A.C. Suter in the Regulation of Insider Dealing in Britain (Butterworth, London & Edinburgh 1989 at p.122)

to avoid a conflict of interest situation.[42]

This common law position was reproduced in section 132(1) and section 132(5) of the Companies Act 1965.

Section 132(1) provides that:
"A director shall at all times act honestly and use reasonable diligence in the discharge of the duties of his office."

Section 132(5) provides that:
"This section is in addition to and not in derogation of any other written law or rule of law relating to the duty or liability of directors or officers of a company."

In *Regal (Hastings) Ltd v Gulliver* [43] Lord Russell of Killowen stated that it is the rule of equity that whenever a person is a fiduciary and he uses his position to make a profit, he is liable to account for the profit. It is not a question of fraud or absence of bona fide or considerations as whether the profiteer is under a duty to give the profit for the plaintiff, or

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42 *Boardman v Phipps* [1966] 3 All ER 721; *Industrial Consultants Ltd v Cooley* [1972] 1 All ER 162.

43 [1967] 2 AC 134 at 144.

whether he took a risk or acted as he did for the benefit of the plaintiff, or whether the profit would or should otherwise have gone to the plaintiff.

2.1.4 Insider Trading in Takeover or Merger Transactions

The law governing insider trading in a takeover or merger transaction is contained in Rule 30 of the Malaysian Code On Takeovers And Mergers 1987 and Section 89(5) of the Securities Industry Act 1983.

Rule 30.1 provides that a person who is a party to confidential price sensitive information concerning an offer or contemplated offer must treat that information as confidential and must not disclose the information to any other person nor make any recommendation to any other person to enable that other person to deal in securities, unless it is necessary to do so. The person in possession of such information must ensure that such information is not leaked out to an unauthorised person.

Rule 30.2 states that save for the dealings conducted by the offeree related to a contemplated offer or an offer, no dealings in securities relating to such

classes of securities of the offeror company shall take place during the time when there is reason to suppose that there is an announcement of an approach to an offer, an offer or the termination of the discussions leading to the offer.

Rule 30.3 provides that save where when the proposed offer is not deemed price sensitive in relation to such classes of securities in the offeree, dealings in the offeror's securities shall not take place during this period of the offer.

Under the Malaysian Code On Takeovers And Mergers a person other than the offeror and the offeree, who is privy to confidential price sensitive information concerning an offer or contemplated offer,should not deal or recommend any other person to deal in the securities involved in the takeover or merger. The price sensitive information may relate to an offer or a contemplated offer or an announcement of the approach to an offer or an event leading to the termination of the offer.

Section 89(5) of the Securities Industry Act 1983 provides that:

"[Section 89] shall be extended to apply to an officer, agent or employee of a corporation or officer of the stock exchange who makes improper use to gain, directly

or indirectly, an advantage for himself or any other person, by means of specific confidential information acquired by virtue of his position as such officer, agent or employee of the corporation or officer of the stock exchange, regarding -

(a) the possibility of a take-over offer or bid being made to another corporation by the corporation to which he belongs; or

(c) the possibility of his corporation entering into a substantial commercial transaction with another corporation,

to deal in the securities of that corporation in the expectation that, if this information becomes generally known the price of the securities of that other corporation on a stock exchange might be materially affected.

Section 89(5) of the Securities Industry Act 1983 states that section 89 shall apply to an officer, agent or employee of a corporation or officer of the stock exchange who makes improper use of specific confidential information regarding the possibility of a takeover offer or bid being made to another corporation by the corporation to which he belongs or the possibility of his corporation entering into a substantial commercial transaction with another corporation. Since the aforesaid events such as the

possibility of a takeover offer or a bid and the entering into a substantial transaction is specific confidential information, section 89(1) is applicable.

The whole provision of section 89(5) of the Securities Industry Act 1983 refers to the improper use of information from the events from a takeover or merger, and in the event when an issuer undertakes a substantial transaction which affects materially the price of its securities. It appears that the whole provision of section 89(5) is neither redundant nor superfluous as matters relating to takeovers and mergers are contained in a Code such as the Malaysian Code On Takeovers And Mergers.[44] Takeovers and mergers transactions are amenable to changes and the parties involved in takeovers may inadvertently be caught contravening section 89(5). In *ICAL Ltd v County Natwest Securities Australia Ltd & Transfield (Shipbuilding) Pty*

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[44] Under Division 2 of Part IV to the Securities Commission Act 1993 "Takeovers, Mergers And Compulsory Acquisitions, the Malaysian Code on Takeovers and Mergers is a subsidiary legislation with criminal sanctions for the breach of its provisions. But the Minister has not prescribed nor published the Malaysian Code on Takeovers and Mergers. The existing Malaysian Code on Mergers and Takeovers 1987 has been repealed. However in the Listing Requirements of the Main Board and the Second Board of the Kuala Lumpur Stock Exchange, the companies listed on the Stock Exchange have to comply with the Malaysian Code on Takeovers and Mergers 1987. The Securities Commission, in its task in overseeing takeovers and mergers has adopted the Malaysian Code on Takeovers and Mergers 1987.

Ltd.[45] the merchant bankers are placed in a situation in which they have to release non-public information to encourage the rival bidder to make a more attractive counter-bid. The merchant bankers and the directors of the target company are, on one hand, to fulfil their duty as an adviser to the target company, and on the other hand, to avoid being caught under section 89 (5) Securities Industry Act. Disclosure of non-public information by the target company to a potential bidder to facilitate a counter-bid would inadvertently cause both parties to contravene section 89 (5) of the Securities Industry Act. It is submitted that there should be defence or an exemption clause which provides a defence or an exemption to the parties involved in the takeovers and mergers from being inadvertently caught contravening the insider trading provisions under the Securities Industry Act 1983.

In Australia the principal provision of the law on insider trading is provided in Section 1002(G) of the Corporations Law 1991. Section 1002G (1) provides that:

Subject to this Division, where:

(a) a person (in this section called the 'insider') possesses information that is not generally available but, if the information were generally available, a reasonable person would expect it to have a material

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45 (1988) 6 ACLC 467.

effect on the price or value of securities of a body corporate; and

(b) the person knows, or ought reasonably to know, that:

(i) the information is not generally available; and

(ii) if it were generally available, it might have a material effect on the price or value of those securities;

the following subsection apply.

(2) The insider must not (whether as principal or agent);

(a) subscribe for, purchase or sell, or enter into an agreement to subscribe for, purchase or sell, any such securities; or

(b) procure another person to subscribe for, purchase or sell, or to enter into an agreement to subscribe for, purchase or sell, any such securities.

(3) Where trading in the securities referred to in subsection (1) is permitted on the stock market of a securities exchange, the insider must not, directly or indirectly, communicate the information, or cause the information to be communicated to another person if the insider knows, or ought reasonably to know, that the other person would or would be likely to:

(a) subscribe for, purchase or sell, or enter into an agreement to subscribe for, purchase or sell, any such securities; or

(b) procure a third person to subscribe for, purchase or sell, or to enter into an agreement to subscribe for, purchase or sell, any such securities.

Under 1002G an insider is a person in possession of information which is not generally available, and if generally avaliable, a reasonable person would expect it to have a material effect on the price of the securities. An insider may deal directly in insider dealing when he subscribes for, purchases or sells or enters into an agreement to subscribe for, purchase or sell the securities. He may deal indirectly in insider dealing when he procures another person to subscribe for, purchase or sell or enter into an agreement to subscribe for, purchase or sell the securities. An insider may also communicate the information or cause the information to be communicated to another person if he knows or ought reasonably to know that the other person would or would be likely to subscribe for, purchase or sell or enter into an agreement to subscribe for, purchase or sell the securities. The person to whom the insider discloses information, may procure a third person to subscribe for, purchase or sell or enter into an agreement to subscribe for, purchase or sell securities.

An insider is liable to the other person who traded in the transaction who suffered any losses as a result of his insider dealing. The person who suffered the losses, may commence the proceedings to recover the losses within six (6) years from the date the cause of action arises, and irrespective of whether the insider is convicted of the offence of insider dealing or not.

This provision of the law in Australia requires an insider to abstain from all dealing in securities whilst in possession of inside information. In *Loke Tham Chuan v Public Prosecutor* [46] the court commented on the question of possession for purposes of criminal matters in that "a man has not possession of the existence of which he is unaware". The test of "in possession" of inside information has been criticized based on the argument that it extends the limit of liability for insider trading by prohibiting conduct that did not in fact involve the misuse of information. The opponents of the proposed "use" test argued that it was inappropriate to impose liability for trading that was motivated by factors other than reliance upon the confidential information.[47]

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46 [1955] MLJ 3 at 5.

47 See Thomas Lee Hazen in Refining Illegal Insider Trading Lessons from the European Community Directives on Insider Trading Vol. 55 L & CP 25.

The insider trading provisions under section 89 of the Securities Industry Act and section 132A Companies Act emphasise on the fiduciary relationship of the parties before a person is held liable as an insider for purpose of insider trading. This is based on the fiduciary duty theory.[48] Section 90 of the Securities Industry Act 1983 and section 132B of the Companies Act deal with insider trading for officers acting in an official capacity based on "abuse of information" or the "misappropriation theory". On the other hand the Australian provisions on insider trading under section 1002(G) of the Corporation Laws 1991 refers to "the possession of information which is not generally known...". This is attributed to the fact that their laws on insider trading are based on "the equal access theory" on a securities market approach, without any fiduciary or any form of relationship with the issuer or others.

2.2. Insider

An Insider may be defined as a person who has access to and in possession of price sensitive information, which is not generally available, on the securities of a particular issuer, through his connection with the issuer.

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[48] Supra at p 15.

Under Section 89(1) of the Securities Industry Act 1983 an insider is referred to as an officer, agent or employee of a corporation or an officer of a Stock Exchange. Under section 89(4) of the Securities Industry Act 1983 an agent is defined to include a banker, advocate and solicitor, auditor, accountant or stockbroker of the corporation, or any person who is or at any time in the preceding six months has been knowingly connected with the body corporate, and has information which he knows is unpublished price sensitive information. An officer is defined to include a person who at any time within the preceding twelve months was an officer of the corporation.

An insider is also defined to include an official or former official who has had access to unpublished price sensitive information whilst acting in his official capacity.[49] The word "former official" has not been defined in the law to mean an official who has already resigned from his post or an official who has been temporarily relieved from his official post. It is arguable that "former official" in section 90 refers to an official who has knowledge of information which is price sensitive and unpublished at the time of his resignation from his post as an official in a statutory organisation dealing in unpublished, price sensitive information from the issuer.

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[49] See section 90 of the Securities Industry Act 1983.

Under section 340(1)(a)(b) of the Listing Requirements (Main Board) of the Kuala Lumpur Stock Exchange the term "insider" is defined to include all persons who come into possession of material inside information before its public release, such as the controlling shareholders, directors, officers and employees, outside attorneys, accountants, investment bankers, public relations advisers, advertising agencies, consultants and any independent contractors. This includes the husbands, wives, immediate families and those persons under the control of insiders. Insiders also include tippees who come into possession of material inside information.[50] Any person who is involved in a negotiation or an acquisition of securities relating to a takeover or merger etc. may be classifed as an insider.

It is noteworthy that the word "insider" is merely used in the Listing Requirements (Main Board) of the Kuala Lumpur Stock Exchange, and not in the regulations. In the regulations the persons who are insiders are clearly spelt out in detail such as officer, agent and officers of the Stock Exchange and persons who act in an official capacity or former

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[50] Tippee liability is recognised under the Kuala Lumpur Listing Requirements (Main Board) and by virtue of section 11 of the Securities Industry Act 1983, insider dealing by a tippee constitutes a breach of an obligation to the Stock Exchange.

official capacity. The persons who are classified as insiders must be connected with the issuer. An agent is an insider provided that he is connected with the issuer within the preceding six months from the date of his dealing in securities. An officer of the issuer is an insider provided that he is an officer of the issuer within the preceding twelve months from the date of his dealing in securities. An employee of the issuer, an officer of the Stock Exchange and any official acting or has acted in an official capacity are insiders. However a substantial shareholder or any person who may reasonably be expected to give them access to the information is omitted as insider in the laws.

Under section 122(1) of the Securities Industry Act 1983 a body corporate may commit an offence under the Securities Industry Act 1983 and therefore a body corporate can be an insider. Under section 89 and 90 of the Securities Industry Act 1983 an insider is referred to as an individual and it excludes a corporate entity. However it is arguable that an insider may in law be an individual or a corporate entity. If a body corporate is charged for insider trading under section 122(1) of the Securities Industry Act 1983 [51] a

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[51] Section 39B(2) of the Securities Commission Act 1993 states that where a person convicted of an offence under this Act is a body corporate, every person who at the time of the commission of the offence was a director, an executive director, an employee or the secretary of the body corporate or was purporting to act in such capacity shall be

director, a chief executive of the body corporate is deemed to have committed the offence of insider trading [52] unless he proves that the offence was committed without his consent or connivance and that he exercised due diligence at all times to prevent the commission of the offence. In *Chaddock v British South Africa Company* [53] the court observed that the person who represents the company may be the secretary, director or other proper officer. He must not state what is known to him as an individual but what is within the knowledge of the company. But what does a company know? Does the company have the same "knowledge" for all legal purposes? But what if it forgets what it has known? In *Stanfield Properties Ltd v National Westminster Bank P.L.C.* [54] the court held that the company must make reasonable inquiries in answering interrogations to a court. This includes inquiries from the officers or former officers, servants or agents unless they have disappeared or left a long time before the commencement

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deemed to be guilty of that offence unless he proves that the offence was committed without his consent or convenience and that he exercised all such diligence to prevent the commission of the offence as he ought to exercise having regard to the nature of his functions in that capacity and to all the circumstances.

52 In the absence of the deeming provision, the decision in *Dunlop Malaysia Industries Bhd v PP* [1985] 1 MLJ 313 would prevent the court from committing any officer of the corporation for an offence committed by the corporation.

53 [1896] 2 QBD. 153.

54 [1983] 1 WLR 568.

of the case. The test to be applied is reasonableness. Under the circumstances where any person is an obvious source of knowledge, he must be questioned. If he is not, the company should say why.

This deeming provision under section 122(1) of the Securities Industry Act 1983 must be applied with caution. In a Canadian case of *R v Chapin* [55] Dickson J. was called upon to enunciate the defence of due diligence.The court held that an accused exercises due diligence when he took all the care which a reasonable man might have been expected to take in all the circumstances or, in other words that he was in no way negligent in the case.

In United States Of America under section 11 of the Securities Act 1933 a person exercises due diligence if he can establish that he had, after reasonable investigation, reasonable ground to believe and did believe that the statement is true or not misleading.

In *Bryne v Baker* [56] the Full Court of Victoria commented that a director in discharging his duties of his office must act honestly and exercise such degree of skill and diligence which an ordinary man might

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55 (1979) 45 C.C.C.(2d)(S.C.C.) at 344.

56 [1964] VR 443

reasonably be expected to take in the circumstances.

In an American case, *Escott v Bar Chris Construction Corporation*[57] the court found that a prospectus issued by the Bar Chris Corporation contained false and misleading statements and omissions of material facts relating to the corporation's financial position. When the corporation became insolvent the purchasers of its securities brought an action for damages under Section 11 of the Securities Act. The defendants in the case were the corporation's five executive directors, four non-executive directors, an officer of the corporation and the underwriters. All defendants in the case were found liable for misstatements and omissions and failed to establish their due diligence defences. With regard to the executive directors, the court states that the greater the depth of involvement of the corporation's affairs, the higher the standard of due diligence will be expected from them. The Managing Director and the Chief Finance Director were held to have knowledge of all the relevant facts and were precluded from relying on the defence that they had reasonable grounds to believe in the truth of the prospectus. The court imposed a strict liability standard on the executive directors. A

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[57] United States District Court, J.D., New York 1968 283 F. Supp. 643 in Securities Regulation Cases and Material by Richard W.Jennings Harold Marsh JR University Casebook Series 1987, 6th edition.

director who has specialised knowledge or skill of the area to which the misstatement relates must discharge a higher standard of diligence. An executive director who is a lawyer should have known that he was required to make a reasonable investigation of the truth of all the statements in the unexpertised portion of the prospectus. He is presumed to know his responsibility when he is a director. A lower standard of due diligence was applied to the non-executive directors who were found liable only for those parts of the prospectus that were not the responsibility of the experts. The judge held that these directors should have asked questions and then checked the truth of the answers by reference to the company's records.

In *AWA Ltd v Daniels t/a Deloitte Haskins & Sells & Ors* [58] the court held that the executive and non-executive directors were to have different standards of conduct and that in a large corporate bureaucracy the board of directors will not assume to have knowledge of every detail of the corporation's operations. In *Universal Telecasters Queensland Ltd v Guthrie* [59] the court held that due diligence defence requires proof that the defendant has laid down a proper system to check against contraventions of the Act. In that case the defendant had provided adequate supervision to

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58 (1992)10 ACLC 933.

59 (1978) 32 FLR 360.

ensure that the system was properly carried out.

In *Vrisakis v Australian Securities Commission* [60] the court stated that whether a director has exercised a reasonable degree of care and diligence can only be answered by balancing the foreseeable risk of harm against the potential benefits that could reasonably have been expected to accrue to the company from the conduct in question.

In *State Pollution Control Commission v R.V. Kelly* [61] a Corporation was charged with negligently causing a substance likely to harm the environment contrary to the provision of section 6(1) of the Environmental Offences and Penalties Act 1989 (NSW). The defendant had the onus to discharge that he had "used all due diligence" to prevent the contravention. In the course of the judgment Hemmings J. commented that whether a person exercises due diligence depends on the circumstances of the case. A person's mind must concentrate on the likely risks that may exist and take appropriate precautions to prevent the contravention Whether a person has taken precaution is a question of fact and this must be decided objectively from the viewpoint of a reasonable man.

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60 (1993) 9 WAR 395 at 449.

61 (1991) 5 AC SR 607 at 609.

As for the tippee, there is no express provision in the Securities Industry Act that insider dealing by tippee are expressly prohibited. However in section 89 the phrase "in relation to a dealing in securities...or any other person" , and in section 90 the phrase "...in relation to dealing in securities..." impliedly connotes that an insider may deal indirectly in securities through any other person i.e. the tippee, by communicating inside information to him to enable him to deal directly in securities and makes improper use of the information, or deal in securities through a third party without the disclosure of inside information.

The tippee's liability is derivative i.e. its liability is derived from the insider's liability for the insider dealing. It is submitted that if the insider is not liable for the offence of insider dealing, the tippee should not be liable for the offence. In *Dicks v SEC*[62] the Supreme Court held that the insider-tipper must violate his fiduciary duty by tipping improperly before a tippee is found guilty of the offence under Rule 10b-5.[63]

The insider may procure[64] the tippee to enter into the transaction of securities without the communication of the inside information. The tippee

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62 Supra note 34.

63 Infra Chapter 4 paragraph 4.1.4.3 on Other Actions.

64 Procuring does not require a common intention between the principal and the accessory.

involved in the transaction, may not guilty of the offence of insider dealing when he does the act without the fault element required for the offence i.e. the improper use of information in the dealing in securities with an advantage.

As mentioned earlier, under the offence of insider deaing by tippee, a person may be liable for an offence under the criminal law provided that he had actual knowledge that inside information has been communicated to him or, he shut his eyes to the obvious with knowledge that he is a tippee, and not merely having constructive notice that he is a tippee.[65] Unlike in criminal case, in a civil case, dicta of Megarry J. in *Coco v A.N. Clark (Engineers) Ltd*[66] suggested that a person will owe an equitable duty of confidence if he ought to have known that the information was being given to him in confidence. In *Attorney General v Guardian Newspapers Ltd (No.2)*[67] Lord Goff stated obiter " I start with the broad principle (which I do not intend in any way to be definitive) that a duty of confidence arises when confidential information comes to the knowledge of a person (the confidant) in circumstances when he has notice, or is held to have agreed, that the information is confidential, with the effect that it would be just in all the circumstances that he should be

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65 Supra note 23 *Roger v Taylor Central Garages.*

66 [1969] R.P.C. 41 at 49.

67 [1990] 1 A.C.109 at 281.

precluded from disclosing the information to others. I have used the word 'notice' advisedly, in order to avoid the (here unnecessary) question of the extent to which actual knowledge is necessary, though I of course understand knowledge to include circumstances where the confidant has deliberately closed his eyes to the obvious."

In the case of *Attorney General Reference (No.1 of 1988)*[68] the court held that a recipient of inside information about a company become a secondary insider, whether he procures the information from the primary insider by purpose, or effort, or come by it without any positive action on his part.

In *Public Prosecutor v Yong Teck Lian*[69] the court accepted that the accused had information on a prospective takeover bid but, the prosecution failed to prove that the accused had obtained the information by virtue of his position as the company's stockbroker rather than market rumours. As such the case against the accused was dismissed.

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68 (1989)1 ALL ER 3321 affirmed in [1989] 2 WLR 729.

69 [unreported] District Court decision of F.G. Remedios reproduced in Pillai, Sourcebook Of Singapore And Malaysian Company Law (Second Edition) at p.966 - 978.

Walter Woon in his comment on section 103 of the Securities Industry Act of Singapore[70] stated that if the nexus between the insider and the tippee cannot be shown there is no prohibition on the tippee using the information.

In the European Economic Directive[71] Article 2(1) which deals with insider trading, insider trading apply to remote tippees, in that where a remote tippee who overhears the information knowing it to be material, and non-public, would qualify as a secondary insider, since the direct or indirect source of the information could not be other than a primary insider.[72] Article 2 of the European Economic Directive prohibits the use of inside information by those persons (ie. primary insiders) who are members in the administration, occupy a management or supervisory position in the issuer; has a share in the capital of the issuer;or has access to such inside information in the course of his employment, profession or duties. Article 4 of the European Economic Directive prohibits those persons (ie. secondary issuers) who have a direct or indirect relationship with these persons mentioned in Article 2.

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70 Insider Trading And The Abuse of Corporate Information [1987]1 MLJ cxc, at p. cxcviii.

71 Council Directive 89/592 of 13 Nov 1989 co-ordinating regulations on insider dealing, OJ EC 18 Nov 1989, L, 334/30.

72 Supra note 27 at 231.

It appears that there are two classes of insiders ie. the primary insiders and the secondary insiders. The primary insiders are the directors, employees and shareholders of the issuers. The secondary insiders are those who have access to the inside information through their family, professional, or business relationship. Whether an insider should be liable for insider trading by mere possession of information as shown in the insider trading laws in Australia, irrespective of his connection with the issuer is still debatable. The reason is that it may expose a wider and indeterminate class of persons to the risk of being considered as insiders, and that a tippee should know the actual identity of his immediate or ultimate source of the information if he is found liable as a tippee.[73]

Under section 1002(G)(1) of the Australian Corporations Laws 1991, a person is an insider if he is in possession of information that is not generally available, and if such information were generally available, would expect to have a material effect on the price or value of securities from a reasonable man's point of view. A person does not have to be an insider to be an "insider" under the law. It is irrelevant how and from what source the insider obtained the

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[73] Insider Dealing - The New Law: Part V of the Criminal Justice Act 1993 by Keith Wotherspoon at pg 432.

information. This new provisions indiscriminately apply to any market participant whether diligent analyst, or fraudulent director, who by whatever means is in possession of material price sensitive information.[74]

In Australian an insider may also mean a natural person or a body corporate as shown in section 1002(E) of the Australian Corporations Law 1991 where a body corporate is taken to possess certain information possessed by one of its officers.

The basis of the liability for an insider under insider trading is is the breach of fiduciary duty to the issuer, or a duty which may be owed to the shareholders for their derivative interest, being derived from their property right in their share.[75]

Tippee liability for insider trading may be determined on the basis of the misappropriation theory[76] and the equal access theory.[77]

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[74] See Insider Trading - The Need for Conceptual Clarity by Justin Mannolini 14 C & SLJ 151 at 154.

[75] See Sheldon Leader in Private Property and Corporate Governance Part 1: Defining Interests in Company Perspectives cited in Perspectives on Company Law edited by Fiona Macmillan Patfield. London, Kluwer International 1995.

[76] Supra note 9.

[77] Supra note 13.

As stated earlier, a tippee who indulges in insider dealing, has an informational advantage over other participants in the stock market. Based on the principles of integrity and fairness in the securities market, the participants should be equal access to any information which is derived from the issuer. However in *Chiarella*[78] the Supreme Court held that the printer [a tippee] who had knowledge of pending takeover bids , no doubt traded with the target shareholders, but he had no connection with them and was under no duty to disclose.

In Malaysia, a person may be considered an insider only when he is connected to the issuer, whether as employee, agent or through his connection in business or otherwise. This reflects the importance of the fiduciary relationship between the parties before a person can be considered an insider.[79]

In Australia, an insider under section 1002(G)(1) Corporations Law 1991 may refer to any person in possession of insider information. This reflects the emphasis of the equal access theory instead of the fiduciary relationship of the parties.

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[78] Supra note 5.

[79] Section 89 of the Securities Industry Act 1983 and section 132B of the Companies Act 1965 re-emphasise the concept of fiduciary duty of the insiders under the common law and section 132(5) of the Companies Act 1965.

2.3 Dealing

Dealing in securities[80] refers to an act when a person purchases or disposes securities in the market for securities. This act of dealing in securities may be undertaken by an officer,an agent or an employee of an issuer or an officer of a Stock Exchange or an official or former official of the authorities.

A person deals in securities, whether as a principal or an agent, acquires, disposes of, subscribes for or underwrites securities, or makes or offers to make with any person or induces[81] or attempts to induce any person to enter into or to offer to enter into any agreement for or with a view to acquiring, disposing of, subscribing for or underwriting securities; or any agreement (other than a future contract) the purpose or avowed purpose of which is to secure a profit to any of the parties from the yield of securities or by reference to fluctuations in the value of securities.

In *Hooker Investments Pty Ltd v Baring Bros. Halkerston & Partners Securities Ltd & Ors (No:2)*[82] the Court of Appeal of the Supreme Court of New South Wales held that section 128 of the Securities Industry Code

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80 Section 2 of the Securities Industry Act 1983.

81 Bring out, give rise to or persuade as defined in the Oxford Dictionary Of Current English 1992.

82 10 ACLR 524.

(NSW) is directed to transactions between insiders and outsiders concerning trading in securities, and not to underwriting agreements in respect of shares proposed to be issued.

It is submitted that "to deal in securities" under the offence of insider trading should be read to exclude the act of underwriting since an insider only deals in transferable, listed securities and not shares proposed to be issued.

It is noteworthy that to secure a profit in the dealing in securities may mean to avoid a loss. However in section 89(1) of the Securities Industry Act 1983 it is stated that an insider deals in securities to gain an advantage for himself or for another person. It is arguable that the actus reus of the offence of insider dealing ie "to deal" in securities in section 89 (1) of the Securities Industry Act 1983 should be redefined to include the words "to gain an advantage or avoid a loss for himself or for another person".

Under section 1002G(3) of the Corporations Law of Australia a person deals in securities when he subscribes for, purchases or sells or enters into an agreement to subscribe for, purchase or sell any such securities. He may procure another person to subscribe for, purchase or sell or to enter into an agreement to

subscribe for, purchase or sell any such securities. He may disclose the information to another person to enable that person to subscribe etc for securities.

The word "purchase" is defined in section 1002A of the Corporations law of Australian to include a party who acquires an option or right from another party in an option contract;to acquire the option or right under the contract or to take an assignment of the option or right whether or not on another's behalf. The word "sell" is defined to include to grant or to assign the option or right in an option contract, to take or cause to be taken such action as releases the option or right, whether or not on another behalf. In section 1002(D)(2) of the Act if a person incites, induces or encourages an act or omission by another person, that person is taken to procure the act or omission by the other person.

It appears that "to deal in securities" in both Malaysian Securities Industry Act 1983 and in Australian Corporations Laws 1991 refers to the same act of acquiring, disposing of, subscribing for securities and/or inducing any person to acquire, dispose of, subscribing for securities, except that, in Malaysia the act of dealing includes the act of underwriting.

2.4. Information

2.4.1 Definition

Generally information[83] may mean inside information or market information. Inside information[84] refers to information which arises from the issuer and market information is information of any event of general interest which may affect the market for securities.

Market information is commonly defined as information about the events or circumstances which affect the market for a company's securities but do not affect the company's assets or earning power.[85]

Under the Securities Industry Act 1983 the term "information" is not defined.[86] However under section 340(a)(b) of the Listing Requirements (Main Board) of the Kuala Lumpur Stock Exchange "information"

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[83] The American Law Institute has defined information as possession of a natural fact such as a promise, prediction, estimate, projection or forecast or a statement of intention, motive, opinion or law.

[84] In *TSC Industries Inc v Northway Inc.* (1976) 426 US 438 the US Supreme Court held inside information to include these inferences which a reasonable investor would draw from fact in his possession.

[85] Fleischer,Mundheim and Murphy,An Initial Inquiry into the Responsibilty to disclose market information (1973) 121 U.Pa.L.Rev. 798.

[86] "Information" in the Criminal Justice Act 1993 refers to information which relates to particular securities or issuer(s) of securities and not to securities or issuer generally;

is defined as inside information which has not been publicly released and which is intended solely for corporate use and not for personal use and which the Company withholds.

In Australia in section 1002 (A)(1) of the Corporations Law, information includes matters of supposition and other matters that are insufficiently definite to warrant being made known to the public; and matters relating to the intentions or the likely intentions of a person.

It appears that the definition of information include all matters, both facts and future events, that are likely to affect the price of the securities from a reasonable man point of view.

In *Public Prosecutor v G. Choudbury*[87] Justice Sinnathuray of Court of Criminal Appeal in Singapore held that 'specific confidential information' is a question of fact in each case to be resolved on the evidence adduced at the hearing of the case. According to his Lordship "specific information" means knowledge of a kind if generally known might reasonably be expected to affect materially the value of the shares of a company and information under section 113(1) of the Securities Industry Act, 1966 (Singapore) means

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87 [1981] 1 MLJ 76.

knowledge of a particular event or situation such as advice, communication, intelligence, news, notification and the like.

2.4.2 The Characteristics of Information

In the Securities Industry Act 1983 information is described as specific, confidential, unpublished ,price sensitive, and as information which if generally known to the public might reasonably be expected to affect materially the price of the subject matter of the dealing on a Stock Exchange.

Under the Australian Corporations Laws 1991 the term "information" merely refers to information that is not generally available but if the information were generally available, a reasonable person would expect it to have a material effect on the price or value of securities of a body corporate.

2.4.2.1 Specific

The term "information is specific" may mean that the information is clearly defined in relation to a particular subject with its full particulars. In a decided case in England *Chaloner v Bolckow*[88] Lord

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88 (1877-8) LR 3 App. Cas. 933.

Hatherley of Privy Council stated that specific is ordinarily used in the common parlance of language as meaning distinct from general.

In the Australian case of *Ryan v Triguboff*[89] the phrase "specific" was judicially considered in Justice Lee's dictum as "specific information" to which the section refers must have an existence of its own ... must be capable of being pointed to and identified, and its entire content must be capable of being expressed precisely and unequivocally.

2.4.2.2 Confidential

The term "information is confidential" may refer to information received in confidence or which is so classified by the company as confidential. In a decided case in England *Thomas Marshall (Exports) Ltd v Guinle*[90] Sir Robert Megarry V.C. stated that the information must be information, the release of which the owner reasonably believes, would be injurious to him, or of advantage to his rivals or others. The owner must reasonably believe that the information is confidential or secret, that is, it is not already in the public domain, and that the information must be judged in the light of the usage and practices of the particular industry, or trade concerned.

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89 (1976)1 ACLR 337.

90 (1979) Ch. 227 at 248.

2.4.2.3 Unpublished

The term "information is unpublished" in the context of insider trading may mean that information is not published in accordance with the mode of publication as stated in the Listing Requirements (Main Board) of the Kuala Lumpur Stock Exchange that is information has been released to the press and other media for a period sufficient to permit thorough dissemination and evaluation of the information.

2.4.2.4 Price Sensitive

The term "information is price sensitive" may refer to the effect of the release of inside information on the price of the securities in question.

2.4.2.5 Material

The term "information which materially affect the price " may mean the extent to which the information may affect the price of securities from the point of view of a reasonable man. In Singapore in *Public Prosecutor v Allan Ng Poh Meng*[91] the court laid down the standard by which materiality is to be judged is whether the information on the particular share of the market is such that it would influence an ordinary investor to decide whether to buy or sell securities.

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91 [1990] 1 MLJ v.

In *TSC Industries Inc v Northway Inc.*[92] the United States Supreme Court held that information will be material if there is a substantial likelihood that a reasonable shareholder would consider the information important in deciding how to exercise voting rights attached to its shares. There must be substantial likelihood that the omitted information would have been viewed by the reasonable investor as having significantly altered the "total mix" of information made available. The information will be material if it is information of a kind that will affect a reasonable investor's decision whether he will invest in the securities or not.

The price sensitiveness or materiality of information was considered by Bryson J. in *ICAL Ltd v County Natwest Securities Australia Ltd & Transfield (Shipbuilding) Pty Ltd.*[93] This is a takeover case in which insider trading issues were raised. His Honour observed that materiality has to be treated as a question for the Court, although it is conceivable that evidence may be tendered to enable the court to understand why certain matters were material or why they were not.

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92 (1976) 426 U.S. 438 at 449.

93 Supra note 45.

In Australia and in Malaysia whether a piece of information may materially affect the price of securities will depend on how a reasonable man would expect the information to have a material effect on the price or value of securities.

2.4.2.6 Generally Known

The term "information that is generally known "may mean that the information is generally known to those who are accustomed or would be likely to deal in the securities. It may be worth considering the significance of the time factor required for the dissemination of the information to enable the information to be understood by the market. In *Kinwat Holdings Pty Ltd & Ors v Platform Pty Ltd*[94] the court held that notification by letter to the stock exchange in combination with a sufficiently detailed news story in a capital city newspaper made information generally available.

In England under the Criminal Justice Act 1993 inside information is treated as having been made public when it is published under the rules of a regulated market for the purpose of informing investors and their professional advisers; or when the information is inserted in records which are opened to inspection by

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[94] (1982) 6 ACLR 398.

the public; or the information becomes readily available to persons who are likely to deal in securities to which the information relates; or information can be derived from information which has been made public; or information may be treated as public even though it can be acquired only by exercising diligence or expertise; or it has been available only to a section of the public and not to the public at large; or it can be acquired only by observation and it is only upon the payment of a fee.

In the Securities Industry Act 1983 information is generally known appears to refer to a situation when the information is available to those persons when the information is published in a national, business newspaper or in professional journal and/or to the Kuala Lumpur Stock Exchange. It is submitted that there should be a definition of the term "information is generally known" in the Securities Industry Act 1983 "to mean "information is generally available when the information is published in accordance with the rule of the Stock Exchange in which the securities is traded; and such information can be acquired from a search in the office of the Registrar of Companies."

Under section 1002B(2) of the Australian Corporations law 1991 information is generally available if information consists of readily observable matter or

its deductions, conclusions or inferences from such matters, and it has been made known in a manner that would or would be likely to bring it to the attention of persons who commonly invest in securities of bodies corporate of a kind whose price or value might be affected by the information provided that a reasonable period has elapsed from the time of the release of the information.

As mentioned earlier the term "Information" in the Securities Industry Act 1983 refers to information which is specific, confidential, unpublished, price sensitive and if generally known might reasonably be expected to affect materially the price of the subject matter of the dealing on a Stock Exchange. Whereas in Australian Corporatios Law 1991 information merely relates to information which is not generally available and if generally available, a reasonable man would expect it to have a material effect on the price of the securities.

It is suggested that the term "information" be redefined as specific information relating to particular issuers and particular securities, that is not generally available and if available might materially affect the price of the securities listed on the Stock Exchange. The reason is that the objectives of the Legislation in

formulating Section 89(1) of the Securities Industry Act 1983 is to prevent those persons who make use of unpublished insider information that is specific[95] information that is not generally available and if available might materially affect the price of securities under the Securities Industry Act 1983.

2.5 Securities

Securities[96] is defined in section 2 of the Securities Industry Act 1983 to include debentures, stock shares in a public company or corporation, or bonds of any government or of any body, corporate or unincorporate, and includes any right or option in respect thereof and any interest in unit trust schemes.

Dealing in securities under section 132A(4) of the Companies Act 1965 in relation to a corporation means a transaction relating to shares in or debentures of the corporation or interests within the meaning of section 84 made available by the corporation or by a related corporation; or rights or options in respect of the acquisition or disposal of such shares, debentures or interests.

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95 Specific information is precise information and it is not deduction and hunch or rumour.

96 Under Article 1(2) of the EEC Directive securities refer to transferable securities but exclude unit trusts, currency and commodity derivatives.

Under the Securities Industry (Central Depositories) Act 1991 security means debenture, note, stock and share in a public company or corporation, or bond of any government or of any body, corporate or unincorporate and includes any right or option in respect thereof and any interest as defined in section 84 of the Companies Act 1965. Under this Act security is also classified as listed deposited security and unlisted deposited security.

Securities under the Rules For Trading By Member Firm and Member Companies of the Kuala Lumpur Stock Exchange is defined to include such other securities as may be admitted for quotation on the Exchange as the Kuala Lumpur Stock Exchange Committee may from time to time determine.

Under section 89 and section 90 of the Securities Industry Act 1983 securities include the subject matter of the dealing on a stock exchange. At present the subject matter of dealing on a stock exchange includes transferable subscriptions rights, warrants, call warrant, convertible loans, unconvertible loans, shares, 'A' shares, and preference shares.

It is evident that "securities" has been variedly defined under the various regulations in Malaysia. It is submitted that securities should be

defined as listed transferable securities and unlisted securities. To define concisely the term 'securities' it should include ordinary shares, preference shares, debentures, loan stocks, warrants/transferable subscription rights, bonds, notes rights, property trust and foreign securities and such other subject matter that are admitted for trading on the Stock Exchange. The phrase "the subject matter of the dealing" on a stock exchange should be substituted with the words "listed transferable securities" as used in Section 2 of the Securities Industry (Central Depositories) Act 1991.

Securities in relation to a body corporate in Australia is defined under section 1002A(1) of the Corporations Law 1991 to mean shares in the body corporate; debentures (including convertible notes issued by the body corporate; prescribed interests made available by the body corporate; units of shares of prescribed interest; an option contract under which a party acquires from another party; an option or right exercisable at or before a specified time to buy or sell securities referred to as above at a price specified in, or to be determined in accordance with the contract, but does not include a futures contract or an excluded security.

It appears that the classes of securities under the Securities Industry Act 1983 relates to the

same classes of securities as stated in section 1002A(1) of the Corporations Law 1991.

2.6 Losses

Under section 89(2) of the Securities Industry Act 1983 an insider shall be liable to a person for the losses suffered by the person who deal in the securities. In this provision of the regulation "a person" may mean the person who traded at the opposite end of the transaction with the insider, or alternatively it may mean all those persons who suffered losses whilst trading contemporaneously with the insider.

Based on the doctrine of privity of contract, the person who traded at the opposite end of the transaction may entitled to claim the losses suffered therein. When an insider with inside information, sell securities in the stock market, he sell the securities to a participant in the stock market, it is a normal contractual transaction between two parties. Is there any reliance on the part of the participant that the insider will not indulge in insider dealing, and that the participant will suffer expectation losses for loss of bargain, and/or reliance loss for expenditure incurred in reliance on this contractual transaction caused by the insider's wrongful act? It is submitted the insider does not rely on the insider's transaction

when he deals in securities. However if the said transaction is tainted with insider dealing, it is may be construed as a fraud on the source of inside information.[97] The word "fraud" is explained as mere silence as to facts likely to affect the willingness of a person to enter into a contract is not fraud, unless the circumstances of the case are such that, regard being had to them, it is the duty of the person keeping silence to speak, or unless his silence is, in itself,equivalent to speech.[98] If an insider does not disclose inside information and deal in securities, his nondisclosure may tantamount to silence yet he is under a duty on his part to speak. He may breach his duty to speak under the circumstances of the case by his non-disclosure and through his fraudulent insider dealing act. But there is a missing element of causation in the transaction. It is only when consent to an agreement is caused by fraud, the agreement is voidable at the option of the participant whose consent was so caused.

On the other hand, if privity which limit the liability to reasonable proportions were abolished, liability could be indeterminate for an indeterminate time to an indeterminate class.

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97 Supra note 10.

98 Section 17 of the Contracts Act, 1950 (Act 136).

There is no privity of relationship, nor is there reliance by the participant or inducement by the insider, in the absence of the insider's implied or express terms of the transaction, that the insider will not make use of inside information in his dealing with him. An insider being a participant in the stock market is subject to certain obligations[99] as shown his application to be a participant to the Stock Exchange before he is admitted as a participant in the stock market. Unless one could rely the law of obligations, instead of the law of contract with its doctrine of privity of contract, reliance and inducement, there is no cause of action against the insider by the participant.

In a market for securities where the trading in securities is anonymous and match-up of trading is fortuitous, it is not possible to identify the party who traded at the other side of the transaction. Yet the insider has been "unjustly enriched"[100] at the expense of a participant who disposes securities to him in a

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[99] By virtue of section 11(1) and (2) of the Securities Industry Act 1983, a person who is under an obligation to comply with, observe, enforce or give effect to any rule of the stock exchange, and failed to comply with the rule, shall be be in default of the rule and be subject to certain penalties.

[100] It is up the court to conclude whether it would be unjust unjust for the insider to retain the benefit that he should make restitution to the participation or the issuer.

transaction tainted with insider dealing. The insider has committed a wrongful act through his misuse of inside information in his dealing in securities, but he is not accountable to the participant for the participant's losses or damages [which may be theoretical rather than real], due to the element of causation. As an insider, be it a tipper or a tippee, he is liable in restitution to the issuer, where he has access or indirect access to inside information classified as only 'confidential' in the sense that an unauthorised disclosure of such information to a third party while the employment [or contract] subsisted between the parties would be a clear breach of the duty of good faith.[101]

In an American case of *Shapiro v Merrill Lynch, Pierce Fenner & Smith Inc*[102] the Second Circuit suggested that the persons who suffered losses may include all those persons who traded on the opposite side of the transaction with the insider during the same period as the insider trades. In *Wilson v Comtech Telecommunication Corp.*[103] the court refused to award damages to those persons who traded between the time the defendant traded and the time the information is made

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101 See *Faccenda Chicken Ltd v Fooler*[1987] Ch.117 at 136.

102 495 F. 2d. 228, 241 (2d Cir 1974).

103 648 F. 2d. 88 (2d Cir. 1981) 94-95.

public.

Section 20A(a) of the Securities Exchange Act 1934 expressly provides for a private right of action for an investor who trade contemporaneously with any person in the securities of the same class when that person has violated any provision of the Securities Exchange Act 1934 or any provisions made thereunder.

It is submitted that the insider who indulges in insider dealing should be liable to all participants who traded contemporaneously at the same time as the insider, for any losses suffered by them, based purportedly on the obligations to be observed by all the participants in the stock exchange.[104]

No doubt the court may have to determine the participants who traded contemporaneously with the insider. But strict contemporarity is not required so long as there is a reasonable temporal relationship between the event giving rise to the lawsuit and the harmful act which contributed to the event.[105]

Under section 89(1) of the Securities Industry Act 1983 the losses suffered by a person is the

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104 See section 11(2) of the Securities Industry Act 1983.

105 Decision No:309/90 (1991) 20 WCATR 108 at 124 (ONT W.C.A.T. Strachan (Vice-Chair) Klym,Apsey.

difference between the payment made by him or the consideration given by him in respect of the transaction and whatever consideration deemed reasonable if the information had been generally known at the time of the dealing.

The person who suffered losses from a transaction tainted with insider dealing, is a contract claim based on the breach of contract by the insider due to his non-disclosure of information not generally known at the time of the dealing. If an insider made a fraudulent misrepresentation i.e. he did not indulge in insider dealing in a transaction tainted with insider dealing, his wrongful act is a tortious act. Based on the element of "fault" and "the test of proximity" a victim may claim for economic losses caused by his wrongdoing subject to the elements of remoteness and measure of damages.

In an American case of *Elkind v Liggett & Myers Inc*[106] the District Court awarded damages to all purchasers who purchased Liggett & Myers stock on the open market during the one week period when Liggett & Myers officials gave securities analysts advance warning of a sizeable drop in the company's quarterly earnings. The damages were awarded from the time the information was acted upon by a tippee analyst till the public

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106 472F Supp.123 (S.D.N.Y. 1978).

announcement of the earnings one week later. The insider's liability was limited to his profit or loss avoided.

It is submitted that the measure of losses by any party against the insider should be limited to the amount of profit made, or the losses avoided by the insider. The reason is that the claim by the party against the insider should be a "tortious" claim under the law, and that the insider is to be to be placed in the position he would be had the wrong not been committed.

Under section 89 (3) of the Securities Industry Act 1983 the person who suffered losses must commence the civil suit to recover the losses within a period of two (2) years from the date of completion of the transaction of the dealing in securities. Under section 6 (1)(a) of the Limitation Act of 1953 a person can commence a suit in contract or in tort within a period of six (6) years from the date the cause of action arises. It is suggested that since the losses caused by the insider trading are contractual and economic losses, the limitation period under section 89(3) should be extended to six (6) years and to run from the date the cause of action arises.[107]

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[107] A participant may wish to rely on the fact of conviction in a criminal court of law under section 89(1) of the Securities Industry Act 1983 to file

Under Section 125 of the Securities Industry Act 1983 the losses caused by insider trading can only be recovered from the insider in the form of a compensation provided that the insider is convicted of the offence of insider trading under the law.

In *Muniandey v Public Prosecutor*[108] the court held that an award of compensation under section 426(i)(b) of the Criminal Procedure Code cannot be made to the witness as the damage to the witness was not caused by the charge of which the appellant was convicted.

It is submitted that a victim of insider trading may not have the locus standi to appear before the court to claim compensation on the ground of causation. How would a seller who sells to an insider be identified,and how would his losses be quantified?

In Australia under section 1013(2)(3)(4)&(5) of the Corporations Law 1991 the person who suffered the losses shall claim from the insider the difference between the price at which he dealt in the securities and the price of the securities had the information been generally available in the market. That person has to

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a civil suit and a criminal hearing may take a few years to dispose of the case.

108 [1955] MLJ 231.

establish a relationship of privity with the insider before he can commence a civil suit for loss. To recover the losses under section 1015, he must commence proceedings within six (6) years from the date the cause of action arises and irrespective of whether the accused is convicted of the offence or not.

It appears in Australia and in Malaysia that a victim of insider trading who suffered losses may only claim losses based on a claim in contract. If the insider were to purchase the securities from a participant in the stock market, that participant, being a shareholder of the issuer, has had a relationship with the insider because he derived his interest from his interest in the securities he possessed. Based on this special relationship between the parties, there may be a cause of action in contract, but subject to the elements of causation and remoteness and measure of damages.

If the insider misrepresents to the other participant in the transaction, and induces him to enter into the contract with the insider, his misrepresentation may constitutes a breach of contract on one hand, and a deceit [fraudulent misrepresentation] on the other. An insider, being involved in insider trading when he is in possession of inside information,

but without any fraudulent misrepresentation but, a mere non-disclosure or silence do not constitute inducement to enter into a contractual relationship.

2.7 Defence

Under section 89(2) of the Securities Industry Act 1983 an insider shall not be liable for the offence of insider dealing if the person who is affected by the transaction knew or ought reasonably to have known of the information.

In a criminal case whether the person knew or ought reasonably to have known of the information is irrelevant to the prosecutor.It does not affect the culpability of the offender in committing the offence.In a criminal case the defence was a matter to be established by the defendant and it is not necessary for the prosecutor to disprove the defence to establish a case against the defendant.[109] The defence of whether he knew of the information or ought reasonably to have known of the information may be a defence to a person who wishes to institute a civil suit against the insider.

It may be a defence under Section 89(1) of the Securities Industry Act 1983 if the insider makes

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109 *R v Cross* [1990] BCC 237.

authorised use of the information. Alternatively the insider shall not be liable for the offence if he did not directly or indirectly make any gain or avoid any loss in his transaction in securities.

In England under section 53 of the Criminal Justice Act 1993, a person will not be regarded as taking advantage of inside information if he shows at the time of the alleged offence that he lacked the necessary intent to make use of the information. A person lack the necessary intent if in the dealing he does not intend any person to secure a profit or avoid a loss, and in disclosing inside information he does not expect any person to deal or secure a profit or avoid a loss. If he encourages another person to deal in securities, he does not intend that person will secure a profit or avoid a loss.

It is submitted that the Securities Industry Act 1983 should state explicitly the defences available to the insiders when he is charged in an insider trading as an insider-tipper for disclosing inside information to outsiders. The reason is that he may in the eyes of justice, qualify for certain defences which may not run against the law on insider trading.

In Australia it is a defence to insider trading under section 1002(7) of the Corporations Law if

the court is satisfied that the information came into possession solely as a result of the information having been made in a manner that would or would be likely to bring to the attention of persons who commonly invest in securities of bodies corporate of a kind whose price or value might be affected by the information, and the other person knew or ought reasonably to have known of the information before the information was communicated to him.

In the securities market there are certain acts that have to be performed by the market makers and certain market intermediaries such as dealers, dealer's representatives, underwriters and trustees of unit trusts or pursuant to a legal requirements imposed by the court, even though their acts of dealing may technically constitute insider dealing. However there is no statutory provision in the Securities Industry Act 1983 which sets out such exemptions for such market makers etc.

In an Australian case of *Hooker Investments Pty Ltd v Baring Bros. Halkerston & Partners Securities Ltd & Ors (No.2)* [110] the court held that whatever information passed by the underwriter to induce other parties to enter into sub-underwriting agreement was not in breach of the insider trading provisions.

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110 Supra note 82.

It is submitted that the securities laws in Malaysia should provide certain exemptions to protect those market makers and market intermediaries including underwriters etc who deal in good faith in the event they are charged for the offence of insider dealing.

In Australia there are express exemptions in the Corporations Law 1991 which exempt certain categories of persons from contravening the laws under insider trading. Section 1002G(2) of the Corporations Law 1991 provides that insider trading does not apply to trustee who redeem a prescribed interest under a buy-back covenant in a trust deed under section 1002H; to underwriters under section 1002J; for purchase of securities pursuant to a legal requirement under section 1002L; disclosure of information pursuant to a legal requirement under section 1002L; chinese wall arrangements by bodies corporate under section 1002M and partnership under section 1002N; exemptions for bodies or its agents who enter or propose to enter in the course of agreement for the securities of the other body corporate under section 1002Q and under section 1002R respectively; transactions by market makers such as dealers or dealers' representatives under section 1002S.

2.8 Penalties

Under section 91 of the Securities Industry Act 1983 a person who contravenes or fails to comply with the sections relating to insider dealing is liable to a fine of not less than one million ringgit and to imprisonment for a term not exceeding ten years. Whereas under section 132A(6) of the Companies Act 1965 dealing with the same offence the penalty is a mere imprisonment for five years or thirty thousand ringgit or both. It is submitted that this anomaly in the regulations relating to insider dealing has to be rectified by the authorities immediately. Since a body corporate can be liable for the offence of insider dealing the combined sentence of fine and imprisonment should be imposed disjunctively.

Other than section 132(2) of the Companies Act 1965, there is no civil penalty imposed on the offender of an insider dealing offence.

In America, under the Insider Trading Sanctions Act 1984, the court is authorised to impose a civil penalty of up to three times the insider's (or his tippees') profits.

In Australia the penalty provisions for an offence of insider trading is dollars two hundred thousand or imprisonment for five years or both.

2.9 Options For Reforms to the Securities Industry Act 1983

Section 89(1) of the Act should read as follows:-

"A person who is in possession of specific information, which if generally available might materially affect the price of transferable, listed securities of particular issuers, and makes use of such information to deal in the securities commits an offence."

Section 89(2) should read as follows:-

"A person who causes the use of specific information which if generally available might materially affect the price of transferable listed securities of particular issuers, by any other person to deal in such securities commits an offence unless he proved that he had no knowledge that the other person will deal in such securities or he believed on reasonable ground that the other person will not deal in such securities."

Section 89(3) should read as follows:-

"He shall be liable to those persons who suffered loss whilst trading contemporaneousy in the particular listed transferable securities with him at the material time."

In this section -

"a person" means those persons who are connected to the issuers such as directors, substantial shareholders or those persons in the employment of the issuer by way of contract of service or contract for service but the expression does not include:-

(a) a trustee who had to redeem the prescribed interest under a deed of trust which contained a buy-back covenant in the trust deed;
(b) the underwriter
(c) the person who is a dealer or a dealer's representative.

Section 91 of the Act on penalty should read as follows:-

"A person who commits an offence under section 89 is liable upon conviction to a fine not less than Ringgit Malaysia one million and/or imprisonment for a term not exceeding ten years."

The following words or phrases that form part of the offence of insider dealing should be amended to make their meaning clearer:-

(a) information to mean inside information which has not been publicly released and which is intended for a corporate purpose of the issuer.

(b) "the subject matter of dealing in the stock exchange" should be substituted with the words "listed securities on the Stock Exchange".

(c) "securities" should be defined as listed transferable securities and unlisted securities. Listed transferable securities should be defined as stocks, shares, debentures, warrants and such other subject matter that are admitted to trading in the Stock Exchange. Unlisted securities should include all classes of securities not included in the definition of listed transferable securities.

It is proposed to include a new section in the Securities Industry Act 1983 that no prosecution for an offence under this Act shall commence after the expiration of:

(a) three years from the commission of the offence; or;

(b) one year from its discovery by the prosecutor, whichever is the earlier:

Provided that it shall not be a bar to the commencement of a prosecution for an offence under this Act notwithstanding the expiry of the period specified in the above paragraph (b) if the Public Prosecutor certifies in writing that the accused by his own conduct contributed to the delay in the commencement of the prosecution.

CHAPTER 3

SELF-REGULATION BY THE STOCK EXCHANGE

3.1 Introduction

The Stock Exchange in Malaysia is a self-regulatory body. In Malaysia, there is the Kuala Lumpur Stock Exchange. As a frontline self-regulating body, it is governed by its memorandum of association and the articles of association.[1] In its operation, it has formulated rules governing the membership, management, operations or procedures of the stock exchange such as:-

(i) rules relating to member firms and member companies; and

(ii) rules for trading by member firms and member companies;[2] and

(iii) the initial listing requirements and the continuing listing requirements of the stock exchange.

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[1] The memorandum of association and articles of association constitute a statutory contract between each member and the company and between the members inter se : *Hickman v Kent or Romney Marsh Sheepbreeders' Association* [1915] 1 Ch 881.

[2] Article 52 of the Articles of Association.

Section 33 (1) of the Companies Act 1965 (Act 125) states that subject to this Act, the memorandum and articles shall when registered bind the company and the members thereof to the same extent as if they respectively had been signed and sealed by each member, and contained covenants on the part of each member to observe all the provisions of the memorandum and of the articles.

Professor Gower proposes that the memorandum and articles have direct contractual effect in so far they purport to confer rights or obligations on a member otherwise than in his capacity of a member.[3] Whereas Professor Wedderburn's assertion was that a member can compel the company not to depart from the contract with the member under the articles. But it may indirectly enforce outsider's rights vested in third parties or in the member so long as he sues qua member and not qua outsider.[4] G.D. Goldberg the Solicitor of the Supreme Court of Victoria[5] contended that a member of a company has under section 20(1) of the Companies Act[6] a contractual right to have any of the affairs of the company conducted by the particular

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3 In L.C.B. Gower's Principles of Modern Company Law 4th edition.

4 [1957]CLJ 194.

5 48 MLR 158.

6 This section is in pari materia with section 33(1) of the Malaysian Companies Act 1965.

organ of the company in accordance with the Companies Act or the company's memorandum and articles, even though in enforcing that member's right (and the correlative obligation) he may incidentally enforce also a right or power bestowed by the memorandum or articles on a person in a capacity of an outsider rather than as a member of the company.

It is submitted that the members of the exchange that is, the member firms and member companies can enforce their rights stated in the memorandum and the articles, but in doing so, they may incidentally enforce the powers and rights bestowed by the memorandum and articles on them as outsiders, but cannot sue otherwise than as a member.

The objectives of the Kuala Lumpur Stock Exchange in the memorandum of association are inter alia, to regulate the conduct of business in securities of a stock exchange through the establishment of just and equitable principles in the market for securities; to institute a policy of market surveillance and corporate disclosure; to promote and protect the interests and welfare of the members of the exchange through arbitration amongst members; amendments of the rules relating to members and rules for trading by members; to provide, enact and amend the listing requirements of the issuers and to enforce a code for mergers, takeovers, etc.

The Kuala Lumpur Stock Exchange is subject to the control of the Minister of Finance[7] and the Securities Commission. The Minister of Finance has the power to approve the setting up of a stock exchange, and to appoint any person to the stock exchange committee.

The Kuala Lumpur Stock Exchange is controlled by the Securities Commision through the amendment of its rules of the stock exchange. Whenever the Stock Exchange wishes to amend its rules, it has to forward the proposed draft amendments of the rules (except those rules declared by the Securities Commission that do not require approval of the Commission) for the Securities Commission's approval. Amendments to the rules of exchanges made by the Stock Exchange without the approval of the Securities Commission shall have no effect.[8] If the Stock exchange fails to comply with a direction from the Securities Commission pertaining to the amendment of the Rules, the Exchange commits an offence under section 9(8) of the Securities Industry Act 1983.

Under the Kuala Lumpur Stock Exchange Articles of Association, there is only one article 52 in the Articles of Association which mentions the Rules of the Exchange but

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7 Section 8 of the Securities Industry Act 1983.

8 Section 9(1) of the Securities Industry Act 1983.

the words "Listing Requirements" do not appear in the Articles of the Stock Exchange. Rule 2(2) of the Rules For Trading By Member Firm and Member Companies merely provides that companies who wish to quote their securities on the Official List of the Exchange shall apply in such form and on such terms and conditions as the Committee of the Stock Exchange determines from time to time after consultation with the Securities Commission. The Committee of the Stock Exchange may admit, refuse to admit any company to the official list or suspend any company for any period or delist any company at any time without assigning any reason therefor and the decision of the committee shall be final and conclusive.

In Australia the relationship between the issuer and the Stock Exchange is governed by its listing rules and the business rules. The Australian Stock Exchange is empowered under Article 74(1) of its Articles of Association to quote the securities of the issuer on the official list of the Exchange. Article 4(4) of the Articles of Association of the Australian Stock Exchange provides that the Exchange shall admit corporations to the list 'on such terms and conditions ...as the Board of the Exchange shall from time to time determine. The Listing Rules of the Exchange are defined in section 761 of the Corporations Law 1991 as the rules, regulations and bye-laws relating to

the admission to or removal from the official list of the body corporate, governments, unincorporated bodies or other persons for the purpose of quotation on the stock market of the securities of the bodies concerned.[9]

Under the articles of association of the Australian Stock Exchange, the Australian Stock Exchange has the power to make listing rules. However the amendments to the listing rules must be filed with the Australian Securities Commission, and subject to approval by the Minister.

There appears to be a lacuna in the Articles of Association of the Kuala Lumpur Stock Exchange on the Listing Requirements. In Article 52 of the Articles of Association it should stipulate that the Exchange shall establish an official listing of issuer whose securities are quoted on the official list, and that the issuers are bound by the Listing Requirements of the Exchange. The Kuala Lumpur Stock Exchange merely requests the issuer to execute a letter of undertaking to comply with the listing requirements upon its admission for listing to the official List of the Stock Exchange. The Listing Requirements by

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[9] Such listing rules are considered to be commercial rules to be policed by commercial people : *Fire & All Risks Insurance Co Ltd v Pioneer Concrete Services Ltd* (1986) 10 ACLR 760 at p. 764.

itself lack statutory force but derive its effect from the law of contract between the Exchange and the issuer.

Several case laws in Australia confirm the fact that upon the issuer's application to the Stock Exchange for the listing of the issuer on the stock exchange, and the quotation of its securities on the exchange, and its subsequent acceptance by the exchange for listing, there exists a contract between the issuer and the exchange.[10]

If any issuer commits a breach of any provisions in the Listing Requirements, the Kuala Lumpur Stock Exchange may take action against the issuer concerned under section 11(1) of the Securities Industry Act 1983. It should be noted that subsection 11(1) of the Securities Industry Act 1983 does not deem the rules of the Stock Exchange (which includes the listing requirements) to be equivalent to the provisions of the law. It merely enables the Kuala Lumpur Stock Exchange to enforce the rules against those persons who are under an obligation to comply with the requirements. It appears that if the issuer fails to comply with the rules, it has breached the rules ie. indirectly a provision of the law under the Securities

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10 *Ampol Petroleum v R.W Miller (Holdings) Ltd and Others* [1972] 2 NSWLR 850; *Repco Ltd v Bartdon Pty Ltd* [1981] VR 1; *Designbuild Australia Pty Ltd v Endeavour Resources Ltd* [1980] ASLC 86, 120.

Industry Act 1983.[11]

In section 11(2) of the Securities Industry Act 1983 the stock exchange may, in addition to or in lieu of any action which it may take under the rules of the stock exchange (which includes the listing requirements) give a direction to the person in default to comply with, observe, enforce or give effect to any of the listing requirements or impose a penalty not exceeding ringgit two hundred and fifty thousand on the person in default or reprimand the person in default.

It is submitted section 11(2) is a redundant provision, based on the premise that the listing requirements constitute the rules of the stock exchange.[12] Rules of the stock exchange should be clearly defined in the Articles of Association of the Kuala Lumpur Stock

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11 Can section 11(1) of the Securities Industry Act 1983 be interpreted in such manner that a decision by the Stock Exchange not to enforce a breach of the rules be deemed improper by any aggrieved person and that an aggrieved person may apply to the court for an order to seek compliance.

12 Rules in section 2 of the Securities Industries Industry Act 1983 refers to rules governing the quotation of securities of the stock market. It is submitted since the Listing Requirements include matters relating to listing of securities, based on a liberal interpretation, rules of the stock exchange should include matters governing the dealing in securities.

Exchange.[13] The rules of the stock exchange are defined in section 2 of the Securities Industry Act 1983 as rules contained in the memorandum of association and articles of association,[14] rules and procedures governing the quotation of securities on the stock market of the stock exchange, rules to ensure compliance by member companies of any obigations imposed by the laws and rules for the proper operation and management of the stock exchange.

The Kuala Lumpur Stock Exchange may rely on section 100(1)(b) of the Securities Industry Act 1983 by way of an application to the High Court to seek directions or orders from the Court to seek compliance with the listing requirements or to secure compliance with the rules of the stock exchange.[15]

Section 777 of the Corporations Law 1991 in Australia provides inter alia, that where a person is under an obligation to comply with or enforce the business rules

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13 The rules of the stock exchange is defined in section 2 of the Securities Industry Act 1983 to include rules contained in the memorandum of association and the articles of association or other constituent document of the stock exchange.It should exclude the rules contained in the memorandum of association.

14 The memorandum and articles of association governed the framework of the stock exchange setting out its objectives and functions but does not affect the actual workings of the exchange through its rules.

15 This provision is applicable to an aggrieved person who has suffered losses or likely to suffer losses caused by the person who was engaged in any contravention.

or listing rules of the stock exchange and that person fails to comply with, observe ...or give effect to those rules, on the application by the appropriate person [which includes the Australian Stock Exchange, Australian Securities Commission and a person aggrieved by the failure to comply with rules of the stock exchange] the court may make an order giving directions to the person who has failed to give effect to the rules. An aggrieved person is defined under section 1114(a) of the Corporations Law 1991 as the person being aggrieved by a contravention of the rules of the stock exchange when he is a holder of securities in the body corporate whose securities are quoted on the stock market of the Stock Exchange.

In Australia section 1114 of the Corporations Law 1991 provides that a person who has contravened the listing rules or is about to do an act, if done, would constitute such a contravention, the stock exchange may apply to the court for orders to deal with the matter.

It appears that an aggrieved person[16] in Malaysia may be informed by the Kuala Lumpur Stock Exchange of its intention to take any of the actions under subsection (1) against the person who breached the rules of the Stock Exchange. But an aggrieved person cannot take

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16 See section 11 (4)(b) Securities Industry Act 1983.

action against the person in default of the rules of the Stock Exchange in a court of law. Whereas in Australia the aggrieved person has a statutory right to take action under Section 777 of the Corporations Law 1991.

It is submitted that there should be a provision in the Securities Industry Act 1983 which provides that an aggrieved person should be able to file a civil remedy in a court of law in the event he suffered losses caused by the person who breached the rules of the Stock Exchange.

In Malaysia the Listing Requirements of the Kuala Lumpur Stock Exchange has yet to be subjected to interpretation in a court of law even though there are several provisions in the Listing Requirements relating to insider trading which are not clear.[17]

In Australia the courts have adopted both a narrow and broad interpretation of the Listing Rules. In *Hillhouse & Ors v Gold Copper Exploration NL & Ors*[18] the court stated that the listing rules still need to be proved according to the rules of evidence.

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17 See Chapter 2 on section 89 of the Securities Industry Act 1983.

18 (1989) 7 ACLC 332 at p. 336.

In *Repco Ltd v Bartydon Pty Ltd,Canadian Tire Corporation Ltd & Mc Ewans Ltd*[19] the court stated that a person will only assume an obligation to observe the Listing Rules when that person is bound by contract or statute to do so. However in *TNT Australia Pty Ltd v Poseidon Ltd*[20] Jacobs J. stated that a strict and literal interpretation of the rule would defeat the purpose of the rules under the prevailing circumstances and such commercial document ought to be construed and interpreted by the court in such a way as to give effect to the spirit and letter.

It is submitted that the Listing Requirements of the Kuala Lumpur Stock Exchange should be made precise and clear in its interpretation so as to eliminate any ambiguity and contradiction as the case may be.

The Kuala Lumpur Stock Exchange or any person acting in the name of the Kuala Lumpur Stock Exchange shall not suffer any liability for any acts or omission in the purported performance or performance of its duties and powers under the Securities Industry Act 1983 if the Stock Exchange acts in good faith.[21]

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19 (1980) CLC 641.

20 (1989) 7 ACLC 303.

21 Section 10(3) of the Securities Industry Act 1983.

In Australia under section 779(7) of the Corporations Law the Australian Exchange has qualified privilege for the publication of the information about a request by the exchange to a listed entity for information in relation to compliance by the entity with or a contravention by the entity of the law or the exchange rules ; or information or a document to the exchange by a listed entity in response to such a request.

3.1.1. Against the Members of the Stock Exchange

Rule 2(2) of the Rules Relating To Member Firms and Member Companies,[22] states that every member firm and member company may use the trading facilities on the exchange, and to be a member of the exchange, he shall execute a letter of undertaking in favour of the exchange that he will comply with the rules of the exchange.

Rule 7(1) of the Rules Relating To Member Firms and Member Companies,[23] states that a member firm or member company shall not sell, dispose of, purchase, exchange, or acquire securities through share hawking, or through any other methods not duly approved by the Committee, nor knowingly permit any its interested bodies

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[22] Rule 2 relates to the Mode of Trading.

[23] Rule 7 relates to Conduct of Business by Member Firms and Member Companies.

to effect the same. Every member firm or member company shall not, in the opinion of the Committee, advertises securities for sale or purchase, nor knowingly transact business for or on behalf of any person, firm or company whose businesses are conducted in such like manner.

As for the control over the employees, Rule 18(1) of the Rule For Trading By Member Firms And Member Companies,[24] states that, provided that a partner of a member firm or member company consented to the transaction, and that transaction does not involve a conflict of interest situation, a member firm or member company shall not deal in any transaction in securities with its employees or the employees of another member firm or company.

Rule 18(2) of the Rules For Trading By Member Firms and Member Companies also states that, provided that each transaction by an employee of a member firm or member company is authorised in writing by a partner or a director of the member firm or member company, a dealer's representative of any member firm or member company shall not deal in transactions for securities for any employee of a member firm or member company.

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[24] Rule 18 deals with employees' transactions.

Any member of the Exchange who violates any articles, rules, or fails to comply with the Committee's decision made under the Rules Relating To Member Firms and Members Companies and Rules For Trading By Member Firms and Member Companies in their dealing in securities, or is found by the Committee to be guilty of misconduct as a member shall be liable to a fine, suspension or expulsion.

In Australia the Board of Exchange may impose any penalty as it deems fit, or order the member to pay the total commission or gross profit or part thereof arising from the relevant transaction, and reasonable costs or proportions therefor incurred by the stock exchange in the conduct of the hearing.

Under Rule 15A (ii) of the Rule Relating To Member Firms And Member Companies if the Committee is of the opinion that a review of the policies of the management and business practice of any member firm or member companies is necessary in the interests of the members, exchange and the public, the Committee shall take over the control and the management of the said member firm or member company. This power to take over control of the management of the member firm or member company by the Committee of the Stock Exchange is extremely wide and

sweeping in scope and needs further clarification and explanation in its scope of work. It is suggested that in the event that workings of the member firms or member companies breached the rules of the exchange, receivers or managers should be appointed as agent to manage the member firms or member companies, but under the direction of the stock exchange.

Under Rule 4(1) and (2) of the Rule For Trading By Member Firms and Member Companies, if the Committee is of the opinion that there has been manipulation or excessive speculation in any dealing in any listed securities, the Committee may consult the Securities Commission, and then make a declaration that a particular listed security is a designated security. Upon such declaration by the Committee and to facilitate the Committee's investigation in the malpractices in dealing in securities, the Committee may impose restrictions or prohibitions in the dealing in securities by imposing a margin[25] of cover in the dealing; by restricting the dealing in securities to immediate or prompt bargains; prohibiting any sale, and if the sale is permitted the seller shall deliver the share or stock certificate

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[25] There has arisen a practice of buying and selling of options and a custom of the agent advancing the needed cash, called margins, for the purpose of securing or of protecting the bargain... *William E Beamish v James Richardson & Sons Limited* (1914)S.C.R.595 at 597.

together with the duly executed transfer forms at the time of execution of the contract of sale.

In view of the numerous cases relating to securities laws in particular insider trading[26] Rule 4(1) to (2) of the Rule For Trading By Member Firms And Member Companies which deal with manipulation and speculation should also apply to insider trading. Furthermore there should be a provision which enables the Committee to withhold the proceeds of sale from the dealing in securities in a suspense account. However it is not possible for the Committee to ascertain whether there is manipulation in the market for securities under the law. As such Rule 4 should provide for cases when the Committee may withhold the proceeds of sale from those persons suspected to be involved in insider trading or manipulation when the Committee suspect them to be involved in insider dealings or manipulation. However those persons may apply to a court of law for the release of their sale proceeds. As such the stock exchange must be absolutely certain that there is a prima facie case for insider trading or manipulation before it proceeds under subparagraph (iii) Of Rule 4 of the Rule For Trading By Member Firms and Member Companies.

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[26] See the Securities Commission Report 1993,1994,1995 and 1996.

Since it is extremely difficult to detect offences of insider dealings under the securities laws, a new rule should be included in the Rules For Trading by Member Firms & Member Companies that places an obligation on the member firms, or member companies, who are involved in the dealing in securities, to report to the Committee, any dealings in securities, suspected to be tainted with insider dealings. If the member firms or member companies suspect that any dealing is an insider dealing, then they should report the facts of such transactions to the stock exchange.

In Australia Business Rule 3.15 of the Australian Stock Exchange provides that the brokers shall report to the Surveillance Department of the Australia Stock Exchange on the nature of the dealings in securities by its clients. Since the Business Rules formed part of the securities contract which involved the broker and the client, the client may be taken to have acquiesced to the breach of confidence when the broker report to the Stock Exchange on this matter.

The Kuala Lumpur stock exchange should take preventive measures to advise the member firms and member companies on insider dealings and suggest to them to take

self-regulatory measures to reduce the incidence of insider trading by the dissemination of guidelines or circulars.

3.1.2. Against The Issuers Of Listed Securities

The issuers of listed securities on the official list of the Kuala Lumpur Stock Exchange are required to comply with the Stock Exchange Initial & Continuing Listing Requirements. If the issuer commits a breach of the Listing Requirements, the Committee may, after consultation with the Securities Commission issue a public reprimand; or suspend its trading of securities for a certain period; or restrict all dealings in securities to immediate or prompt bargains; or prohibit the sale in securities unless the seller deliver the share certificates together with the duly executed transfer; or delist the issuer from the official list; or any other penalties and conditions as the Committee thinks fit.

It is pertinent to note that whatever penalties the Committee wishes to impose on the issuers for every breach of the listing requirements are enforceable in practice. It is difficult if not impossible to delist the issuer from the official list of the stock exchange when it may jeopardise the interests of the investors and/or participants in the securities market and at the same time disrupt the workings of the capital market.

Even though it is clearly stated in section 392 of the Listing Requirements that the Committee of the Kuala Lumpur Stock Exchange shall, after consultation with the Securities Commission reprimand the issuer who breached the rules, in practice the reprimand is issued by the Securities Commission. This is as stated in the Securities Commission Annual Report of 1993 the case of UCM Industrial Corporation who was reprimanded by the Securities Commission on 2nd July 1993 by the Securities Commission for material deviation in actual pretax profit achieved relative to forecast pretax profit. In addition Samanda Holdings Berhad on the 11th October 1993 was reprimanded by the Securities Commission for material deviation in the utilisation of rights issue proceeds, and deviation in actual pretax profit achieved relative to forecast pretax profit.

Apart from the penalties stated in Section 392 of the Listing Requirements, the Kuala Lumpur Stock Exchange may under Section 11(2) of the Securites Industry Act 1983 direct the person who breached the Listing Requirements to comply with, observe, enforce or give effect to any such listing requirements and to impose the penalties stated in section 11(2)(b). Section 392 of the Listing Requirements should be amended to include the penalties stated in

Section 11(2) of the Securities Industry Act 1983 such as to direct those persons to comply with the listing requirements and impose a fine of not less than ringgit two hundred and fifty thousand.

In Australia the Listing Rules of the Australian Stock Exchange merely provide that breach of compliance by the issuer of the Listing Rules may cause the issuer securities to be suspended from quotation or the issuer may be removed from the official list of the Exchange.

Under Section 340 of the Listing Requirements of the Kuala Lumpur Stock Exchange, the Stock Exchange defines what is insider trading, insider and inside information. It is evident that the definition of insider trading is imprecise in that one element of the offence "improper use of information resulting in a loss (if any) to any person" is not stated at all. [27] Insider is clearly defined to include all persons who come into posession of material information before its public release. Inside information is defined to mean information which has not been publicly released and which the company withhold for corporate use.

The Kuala Lumpur Stock Exchange has formulated a policy on corporate disclosure of information, whereby each

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[27] Section 340(3) of the Listing Requirements.

issuer of securities is obliged to adopt the policy as part of its corporate policy. The Stock Exchange cannot enforce the policy on corporate disclosure of information (which includes the policy on insider trading) without explicit rules. The Stock Exchange should formulate precise rules on insider trading and disclosure of information in mandatory terms and thereafter to enforce the rules with zeal and efficiency.

It is a rule of practice of the Stock Exchange that the issuer of listed securities should formulate its own insider trading policy in consonance with the policy of the Stock Exchange on insider trading. It is a policy of the Stock Exchange on insider trading that insiders should not trade on the basis of material information that is not known to the investing public.

It is submitted that the policy should be reduced to a rule that the insiders shall not trade in the securities when in possession of material inside information.Rules do not work when those willing to comply do not know what compliance involves and also those less willing to comply are not informed or stimulated in the appropriate manner. Effective rule demand that those who design rules take into account the enforcement strategies that will have to be used to achieve compliance.[28]

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[28] See "Why Rules Don't Work" by Robert Baldwin in [1990] 53 MLR 321 at 336.

Insiders should refrain from trading in their securities even after material information on such securities has been released to the public through the press and other media for a sufficient period to permit thorough dissemination and evaluation by the public. The waiting period may vary between a period of twenty four (24) hours to forty eight (48) hours depending on how widely the information is disseminated to the public.[29] This policy should be reduced to a rule that insiders are prohibited from trading in securities for a period of twenty (24) hours to forty eight (48) hours after the dissemination of material information to the investing public.

If the issuer learns that insider trading is taking place or has taken place, the issuer has to make immediate public disclosure of the unpublished, material inside information.[30] Here the Issuer should report the cases of insider trading,if any,to the Exchange.

Whenever unpublished material inside information is disclosed to the employees of the issuer, the issuer should draw the attention of the employees to the prescribed act of insider trading. It may be appropriate

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[29] Section 340(4)(b) of the Listing Requirement.

[30] Section 335(7)(b) of the Listing Requirement.

to require any employee who gained access to such information to report his dealings, if any, in the issuer's securities. This appears to be the best deterrent against insider trading by the issuer by insisting that the insiders file insider trading report with the issuer.

The issuer may establish, publish and enforce effective procedures in the purchase or sale of its securities by the director, employees and other insiders designed to prevent improper trading and to avoid any question of impropriety in insider purchases or sales. The procedure stated by the stock exchange involves restricting their purchases or sales to the period following the release of annual statement, financial conditions or the conduct of the sales and purchases of securities on a regular basis. It is not possible to verify whether the issuer has adopted this policy and implemented this policy effectively that is the scheduling of the purchase and sale of securities unless the issuer conducts an internal audit on the purchase or sale of securities by the insiders. The issuer should give a notice to all insiders including its employees who have access to such unpublished material inside information to declare by way of statutory declaration on their dealings in securities whenever the issuer suspects that insider dealings has taken place.

In Australia under the Listing Rules there is no written policy on insider trading.

The Policy on the Corporate Disclosure of Information states that each issuer discloses material inside information that affects materially the price of its listed securities on the stock exchange, that is accurate, sufficient and in a timely fashion.

In Australia under the Listing Rule 3A(1) a listed company is required to immediately notify the Exchange ... any information which is likely materially to affect the price of the securities of the listed company or is necessary to avoid the establishment or continuation of a false market in the company's securities; or investors and their professional advisers would reasonably require and reasonably expect to be disclosed to the market for the purpose of making an informed assessment of the assets and liabilities, financial position, profits and losses, and the prospects of the listed company and the rights attaching to the security of the listed company.

3.1.2.1. Policy on immediate disclosure of material information

An Issuer is required to make immediate disclosure of material information on all facts relating to its affairs except for events that will prejudice the

ability of the issuer to pursue its corporate objectives[31] or events may be in a state of flux.[32] Disclosure of such information will have more adverse effects on the issuer than on the investing members of the public. This imply that the issuer may withhold information to further the issuer's interest at the expense of the public's interest. It should be emphasised that the issuer should disclose both good and bad information with equal intensity and disclosure of information should be made on a continuous basis and not in a sporadic manner as and when the issuer desires. When should an Issuer disclose information? In an American case of *Kohler v Kohler Co.*[33] the court held that honest and good judgement and common sense as to what is fair will in general suffice as guidelines when to disclose the material information.

It appears that this policy of disclosure is inconsistent with Section 9B (2)(a);(b) of the Securities Industry Act 1983 which provides that the Stock Exchange shall ensure that any interest of the issuer which is protected under any law relating to the corporation conflict with the public interest, the public interest

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31 Section 335(5)(b)(i) of the Listing Requirement.

32 Section 335(5)(b)(iii) of the Listing Requirement.

33 319F 2d 634, 642 (7th Cir.1963).

shall prevail. From this, it is appropriate that this specific rule should be further clarified and amended to avoid any ambiguity in its interpretation.

Under section 335(3)(b)(ii) of the Listing Requirements of the Kuala Lumpur Stock Exchange the issuer shall not indiscriminately disclose information on the ownership of securities when the owner of the securities has a legitimate interest in preserving its confidentiality. This rule should be read subject to the laws under the Companies Act 1965 where the issuer is mandated to disclose in its registers the shareholdings of securities of its directors, its substantial shareholders and its members. In the case of *Raja Nong Chik v Public Prosecutor*[34] Justice Raja Azlan Shah (as he then was) held that directors are expected to observe a high standard of conduct in connection with dealings in their shares, and when they do buy or transfer shares, they have to notify the company. However information pertaining to ownership of securities in the issuer is not current in that it is only after a period of 14 days from the day of its occurrence that the identity of the owners of securities is revealed in the respectve registers of the Issuer.[35]

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[34] [1971] 1 MLJ 190.

[35] Section 69E & 135 of the Companies Act 1965.

An investing member of the public can have access to the particulars of the dealings in the securities of a depositor on the Stock Exchange only when the depositor or his personal representative has given permission in writing to disclose such information.[36] Disclosure of dealings in securities is also permitted where the depositor was declared a bankrupt or has been wound up;[37] or when the depositor was involved in any civil proceedings between a central depository or an authorised depository agent relating to the securities account of the depositor, or in any adverse claims by any parties, where the central depository or the authorised agent seeks relief by way of interpleader; or the depositor was being investigated for any offence under any law. Such information may be disclosed in a summary form so as not to enable the identity of any depositor, to whom the information relates, to be ascertained. However the above provisions are subject to the proviso that no person shall refuse to disclose any information or document to the Minister if the disclosure is required in the interests of investors or in the public interest.

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[36] Section 45(1)(a) Securities Industry (Central Depositories Act) 1991 (Act 453).

[37] Section 45(1)(b) Securities Industry (Central Depositories Act) 1991.

If a participant in the securities market suspects that he is a victim of insider trading and wishes to institute civil proceedings against the insider involved in the dealings, he does not have access to the data on dealings in securities under the law. To enable an aggrieved participant to take civil action against a person for insider dealing, he must have access to the particulars of the person who dealt in the opposite end of the transaction. He has to rely on Section 45 of the Securities Industry (Central Depositories) Act 1991. The participant does not meet the requirements where disclosure of the data on the dealings are permitted under the present state of the law.

The Kuala Lumpur Stock Exchange had declared the securities of an issuer of the second board, Orlando Holdings Bhd. as a designated security on the 27th January 1997. A share analyst commented that since most share analysts had not monitored the counter, it is difficult for them to identify the participants who dealt in the stock. On the other hand, the Kuala Lumpur Stock Exchange is in a position to know the identity of the buyers and the sellers to determine whether in that particular occasion the stock was being manipulated.[38]

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[38] Star Newspaper 28th January 1997.

It may be pertinent to know the reason behind Section 45 of the Securities Industry (Central Depositories) Act 1991 which prohibit the disclosure of information relating to shareholdings in the securities listed in the Stock Exchange.Why is it that the data on dealings in listed securities are classified as private and confidential whereas information on the shareholdings of directors, substantial shareholders and members of the issuer are available to members of the public on payment of a small fee at the registered office of the issuer under the Companies Act 1965? To encourage the participants in the securities market to police the market and to institute civil proceedings for insider dealings, it appears that Section 45 of the Central Securities Industry (Central Depositories) Act 1991 should be amended to enable the aggrieved person as described in section 11(2) of the Securities Industry Act 1983 to file a suit against the offender of the securities laws.

If a participant wishes to have data on the dealings in listed undeposited securities, he has to approach the member firms and member companies of the Stock Exchange or the Stock Exchange itself, and they have also classified such information as private and confidential. Yet the Securities Commission has urged the investing public and the minority shareholders to be pro-active in

helping the authorities to curb irregularities or manipulations in the local stock market and encouraging the public to come forward with whatever information they may have rather than wait for the Securities Commission or the Kuala Lumpur Stock Exchange to start investigation.[39]

It appears that information relating to dealings of listed securities, both deposited and undeposited, are readily available only to the authorities, but not to the participants in the market. To enable the participants in the market to verify the identity of the purchaser, or seller of securities in case of suspected insider dealing, and indirectly police the market for any malpractices in the dealings in securities, the Kuala Lumpur Stock Exchange should advocate a system of full or permitted disclosure of information on dealings in securities whenever the circumstances of the case warrant it. Section 45 of the Act should be amended to include those persons, being holder of securities, and are aggrieved by the person who failed to comply with the rules of the Stock Exchange.

3.1.2.2. Policy on Response to Unusual Market Action

Under section 338 of the Listing Requirements of the Kuala Lumpur Stock Exchange, whenever there is any unusual market activity in the issuer's securities, the

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[39] Star Newspaper July 17 1996.

issuer should make the appropriate enquiry to determine its conditions and take corrective action. The issuer may make an announcement that there is no material development in its business and that there is no reason for the price movements in its securities or the issuer may choose to remain silent, lest they are wrongly interpreted by the public and this may cause uninformed investment decision. It appears to be the practice among the issuers when queried by the Exchange on the unusual market movements in its securities to state that they are not aware of any reasons for such unusual market actions.[40]

It should be the duty of the issuer to notify the stock exchange whenever any unusual market movement occurs in its securities and to conduct an audit on the sales and purchases of securities for suspected cases of insider dealing (if any) under such conditions.

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[40] Pilecon Engineering said in the Star Newspaper dated 5th March 1997 that it was not aware of any rumours or other conditions which contributed to the sharp increase in price and the substantial turnover in the company's shares; Seng Hup Corporation Bhd. said that it was not aware of any rumours or other conditions that had contributed to the unusual market action towards its shares. In its reply to the Kuala Lumpur Stock Exchange queries it said that there were no material developments in its business that had not been previously disclosed to the stock exchange for public release.

Whenever the issuer withholds material information the issuer should keep watch on the market conditions of its securities for any unusual movements in its prices or volumes of transactions. If he detects any leak of information, such information should be released to the public immediately.[41] It is observed that the issuer in general do not comply strictly with this policy.

3.1.2.3. Withholding of information

Under section 335(8)(i) of the Listing Requirement of the Kuala Lumpur Stock Exchange, whenever the issuer withhold the information from the public, the issuer should maintain strict confidentiality and only the highest possible echelon of the management should have knowledge of the inside information. The information should only be disclosed to their employees on a need to know basis, and employees are reminded of the confidential nature of the information and in particular the law of breach of confidence. There should be an express term in the contract of employment for those employees who have access to confidential information that they do not use, or cause the unauthorised disclosure of confidential information, and also to avoid the conflict of interests situation in their course of dealings in securities. The

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[41] Section 335 (5)(c) of the Listing Requirements of the Kuala Lumpur Stock Exchange.

unauthorised disclosure or use of information which is of a confidential nature and which has been entrusted to them imposes an obligation on them to respect its confidentiality. An issuer should take strict action against those persons subject to the obligation of confidentiality, whenever they have knowledge that they have made use of the information obtained through lawful means or not. One form of action is to take an action for breach of confidence. Should the law of confidence be made a statutory offence instead of an offence based on common law?

In Australia there is an express provision in the Listing Rules of the Australian Stock Exchange that there should be continuous disclosure of material information. The Rule states that timely disclosure of information is required to keep the market informed of events and developments as they occur, and that once an entity is or becomes aware of any material information, the entity (that is the issuer) must immediately notify the Australian Stock Exchange.

In Malaysia, there is an express provision on insider trading policy in the Continuing Listing Requirements, whereas in Australia, the matters relating to insider trading are contained in the Corporations Law 1991 and not in their Listing Rules.

3.1.2.4. Independent Directors

Under the Listing Requirements of the Kuala Lumpur Stock Exchange every issuer should have directors,[42] that is, independent directors, who are not related to the officers of the issuer, not related to the substantial shareholders of the issuer, but represent the interests of the shareholders in general, and able to exercise independent judgment. The issuer may appoint independent directors to appraise its management, to provide checks and balances against malpractices, if any, in management.[43] Are the independent directors, independent of management, or do the independent directors have access to the flow of information of the vital events which may affect the issuer?

To strengthen the position of independent directors, who are the linchpin of any board based system of corporate accountability, they should be answerable to the shareholders and not to the board of directors. The board of directors of the issuer should owe a duty to disclose to the independent directors, both favourable and unfavourable information on the issuer. However directors

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[42] Directors are not recognised by their title but by their function depending on the nature of business of the company and the provisions in its articles of association.

[43] Section 9 of the Listing Requirements.

of the issuer share a common bond - directorship of a company and this may cause the independent directors not to make adverse judgment on their "fellow directors behaviour". Independent directors should be appointed by the institutional shareholders to protect their own interests, and that the board of directors should take a serious view of the matters raised by the independent directors. However all directors, be it independent or not, shall be under an obligation to procure the issuer to comply with the listing requirements.[44]

A.F. Conard observed that the presence of independent or outside directors may benefit the corporation in terms of management selection and wiser choices in major corporate policy. But they may be unable or unwilling to challenge the managers, and may be less informed than executive directors. And this may deter judicial investigation of corporate management.[45]

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44 Section 11(3)(e) of the Securities Industry Act 1983.

45 The Supervision of Corporate Management: A comparison of developments in European Community and the United States Law in (1984) 82 Mich.L.Rev.1459.

It is arguable that the law should be reformed to ensure that the board of directors are able to carry out their legal duty, and strict standard should be imposed on them, as well as to provide an incentive to them to perform their legal duties of supervision. V.Brudney suggested that the ambiguity in the standards of fairness, the difficulty in ascertaining and weighing the relevant facts, the psychological and social pressure on independent directors and the limited incentives and weak sanctions available to them, may affect the effective role of independent directors in management. To monitor management effectiveness, it requires a set of criteria that can compare the behaviour of the independent director being monitored, with appropriate and defensible yardstick and criteria. However such criteria are difficult to estabish, keep current and administer in management.[46]

The Stock Exchange of Singapore (SES) publicly censored Scotts Holdings and some of its directors for repeatedly failing to comply with listing rules and demanded that the company's board of directors be filled by a majority of independent directors.[47]

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[46] The Independent Director -Heavenly City or Potemkin Village (1982) 95 Har.L.Rev.597.

[47] The Star Newspaper March 21st 1997.

In Australia the Listing Rules of the Australian Stock Exchange are silent on the role of independent directors in the management of the Issuer.

3.1.2.5. Audit Committee

Under the Listing Requirements of the Kuala Lumpur Stock Exchange the issuer may appoint an Audit Committee which comprises a non-executive chairman and two independent directors, independant of management, free from any relationship with the management to oversee the management of the issuer.[48] The underlying purpose of the Audit Committee is to oversee that the issuer will not commit legal and unethical wrongdoings which may affect the day to day function of the issuer including the acts of both management and the board of directors. It serves as an early warning system on any impending problems that may arise in the organisation. Is the Audit Committee answerable to the Board of Directors, or to the shareholders? The Audit Committee is supposed to focus on the internal controls of the organisation to enhance corporate accountability. It cannot be over-emphasised that the Audit Committee should be an active aggressive body whose acts are answerable to the shareholders, and not to the board of directors. The Audit Committee should

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[48] Section 15A and section 344(A)(1)&(2) of the Listing Requirements.

understand its role in overseeing the operation of issuer based on the premise that the courts cannot review managerial incompetence, under-performance and inefficiency in the management.

In Australia the Cooney Report 1989 has recommended that establishing an Audit Committee be a requisite for public listing of a company and, in Britain the Institutional Shareholders Committee and the Association of British Insurers continue to give institutional backing for the device.[49]

The President of the Singapore Stock Exchange commented on the role of the Audit Committee that the Committee had fallen short of the standard in the discharge of its duties and had not properly fulfilled its role in monitoring the Company. He proposed that quidelines will seek to improve the current framework of regulation so as to deter errant practices and provide early warning sign of any mismanagement. The Chief Executive Officer cannot sit on the audit committee and independent directors must form a majority in the committee.[50]

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49 V.Finch "Company Directors: Who cares about skill and care?" (1992)55 MLR 179 at 208.

50 In the Star Newspaper dated January 20 1997.

Under the Australian Listing Rules, Rule 4.10.2 merely provides that at the time of the director's or trustee report, the entity (that is the issuer) should have an audit committee, if not it should provide a reason for its non-existence in the issuer.

3.1.2.6. Chinese Walls

An issuer may be an ultra-mart in function when it is involved in merchant banking, investment services and corporate advisory services. Whenever an issuer is involved in such varied intermediary functions, it sets up Chinese Walls in the flow of information, and it prohibits its officers and employees from dealing in the sales and purchases of the said clients' securities. It also devises the stop list, watch list and restricted list of securities as a guide to its investment department so as to avoid a conflict of interests in their purchases and or sales of securities for its clients.

A Chinese wall is intended to restrict the passing of price sensitive information to employee or department of a company or partnership engaged in trading or in advising and typically involve policies and procedures to limit the dissemination of information; and

possibly the physical separation of departments.[51]

In Malaysia there is no specific provision in the securities laws[52] that provides that a body corporate shall set up Chinese Walls nor a body corporate shall commit the offence of insider trading if the body corporate does not set up chinese walls in its operation of management when it is in possession of inside information. It is submitted that in Malaysia, Chinese Walls should exist in the issuer, whose nature of business may involve self-dealing and dual agency in its transactions.[53]

In Australia under section 1002M of the Corporations Law 1991 a body corporate does not contravene the laws on insider trading if it sets up Chinese walls in its management in that the decision to enter into the transaction was taken on its behalf by a person, other than that officer in possession of inside information pertaining to a particular issuer.

3.1.2.7. Compliance Officer

Since the Listing requirements relating to

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51 L.E.Herze and DE Colling: the Chinese Wall and Conflict of Interest in (1978) 34 Business Lawyer 73 at 88.

52 The securities laws refer the Securities Industry Act 1983, the Companies Act 1965 and the Securities Commission Act 1993.

53 The rules of Chinese Walls may be in conflict with the common law fiduciary duties.

insider trading are rather complicated and full of ambiguity, it is preferred that a compliance officer well versed with the securities laws and the listing requirements be appointed by each issuer to oversee all matters relating to them.[54] A compliance officer can establish, maintain and enforce the company compliance policies as to timing and accuracy of disclosure as well as the timing of purchases by the insiders.

In Nepline Berhad, a listed Company [55], the Audit Committee is formed to carry out, inter alia the duties such as to establish and periodically review a corporate code of conduct and review compliance with relevant government regulations. It is not possible to ascertain whether its operation is effective enough to achieve its underlying purposes as outlined in its manual. The issuer has explicit in-house rules that clearly state that management and employees should avoid conflict of interest situations, and those who have access to unpublished material information must not use the information for their own personal benefit and should not disclose such information to any third party.

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[54] Hammerman & Pollock "The Need For And Utility of Protective Measures", in ALI-ABA, Fraud and Fiduciary Duty Under the Federal Securities Laws 91 (1982).

[55] The name of the listed issuer is not permitted to be disclosed for confidential reason.

In a particular issuer[56] whose securities are listed on the Kuala Lumpur Stock Exchange (Second Board) there is a code of ethics and conduct where the issuer and the staff are reminded of the provisions contained in the Securities Industry Act 1983 section 89 and section 90. It also emphasises the fact that the authorities view insider trading as a serious matter.

3.1.3. Against the Participants

The Stock Exchange is faced with a mammoth task to self-regulate its members, the issuer and the participants of the Stock Exchange. The participant, prior to his dealing in securities, has to sign an undertaking to the member of the stock exchange that he undertakes to abide by the rules, regulations, by-laws, customs, levies and usages now in force and any subsequent amendments or revisions of the Stock Exchange. However in the Rules of the Stock Exchange there is no rule which governs the misconduct of the participants which fall short of committing an offence of insider trading under the law except for Rule 13(1) of the Rules Relating to Member Firms and Member Companies. Rule 13(1) states that the Member Firm or Member Company shall report to the Committee of the Exchange if a non-member (the participant) failed to meet an obligation with any Member Firm or Member Company. The Committee may enquire into the case by requesting the

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[56] The name of the listed issuer is not permitted to be disclosed for confidential reason.

Member concerned to furnish the full particulars of the case in writing ie. the transactions with which the member and the non-member are involved. If the Committee is satisfied that the non-member has committed a default in payment, the non-member's name will be inserted in the List of Defaulters maintained by the Exchange.[57]

It is suggested that participants in the stock market may be the potential 'tippee' who commit insider trading. It is recommended that there should be a Rule of the Stock Exchange which provides that if a participant commits a contravention of the Listing Requirements (if relevant), then the Kuala Lumpur Stock Exchange can direct the participants to comply with the contraventions; impose a penalty of RM 250,000.00; reprimand the person in default; impose such other penalites as the Committee think fit.[58]

In the event that the participant (or the issuer) is proposing to engage, is engaging in, or has engaged in any contraventions, section 11(1) and 11(2) of the Securities Industry Act are not applicable. It is suggested that there should be a provision in the Rules of

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[57] The word 'obligation in Rule 13(1) was not explained in the Rule. It may imply a financial obligation, but not an obligation under the listing requirements.

[58] The above suggestion is made on the pretext that Section 11(1) & 11(2) of the Securities Industry Act were amended as proposed earlier.

the Stock Exchange (that is the Listing Requirements) to enable the Stock Exchange to conduct a private hearing to determine to what extent the participant (or the issuer) has contravened the rules of the stock exchange. In the conduct of the private hearing by the exchange, its procedure will be based on the rules of natural justice, with the primary objective to direct the participant to comply with the rules of the stock exchange.

In Australia the participants in the Stock Exchange fulfil the same requirements as in Malaysia, by inserting their personal particulars in the Application Form as a participant in the Stock Exchange, and are bound by the Listing Rules etc of the Stock Exchange.

3.1.4 The Kuala Lumpur Stock Exchange

It is pertinent to assess whether the rules of the Stock Exchange provide an adequate level of investor protection, whether there is a satisfactory monitoring and enforcement system and whether there is an effective mechanism in the stock exchange to deal with investor's complaints arising out of the conduct of business in securities.

In the Kuala Lumpur Stock Exchange there is a department named the Advanced Warning And Surveillance

Department in charge of monitoring the unusual movements in the price and volume of securities to detect any incidence of insider trading. For those securities whose prices and volumes showed unusual movements in both prices and volumes for a continuous period seven (7) days, the department will verify the identity of those purchasers or sellers who purchased or sold the securities within a period of thirty (30) days prior to the event of unusual market conditions. If the Advanced Warning And Surveillance Department has enough evidence that such purchasers or sellers are suspected insiders, such evidence will be forwarded to the authorities for further investigation.

The Kuala Lumpur Stock Exchange, being a self-regulatory body enforces its own listing requirements with its continuing obligations on all persons involved in the securities market. No doubt its Listing Requirements has assumed quasi statutory force by virtue of Section 11 of the Securities Industry Act 1983 but it is more appropriate that the Stock Exchange exercises its power by virtue of its own rules which is binding on its members, rather than rely on the securities laws for its legal effect. By relying on Section 11 of the Securities Industry Act 1983 it may reflect that the Stock Exchange's own express powers to enforce its rules is not at all effective nor does it constitute a force to reckon with in the securities market.

Has the Kuala Lumpur Stock Exchange provided sufficient information on the dealings to the investing members of the public to enable them to evaluate the information and discipline the issuers? At present all data pertaining to any wrongdoings ie: breach of any rules and data on dealings in securities are kept confidential and away from the public scrutiny. As a self-regulatory body, it is imperative that if the issuers failed to reveal any information which reflects on the mal-administration of the issuers, then it is incumbent upon the Stock Exchange to reveal the information to the public.

The entire self-regulatory process should be essentially one of co-operation between the government regulators and the market players. This requires frequent and clear communication between the two bodies. To supplement the informal information exchange process, reporting requirements would be established for the self-regulatory organisation [SRO] to provide prescribed information in a specified format to authorities at the prescribed time. This information would relate to membership, disclipinary and business matter of the SRO ,or other matters of which the Government or the public would need to be informed.[59]

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[59] NCSC, A Review of the Licensing Provisions of the Securities Industry Act and Codes (AGPS, Canberra 1985) at p.178.

The companies intended to be listed on the new Over-The-Counter Market, Mesdaq will have to secure the services of a "sponsor"for at least five years after the initial public offer. The sponsors' responsibilities include promoting research materials and disclosure requirements. It is suggested that those listed issuer whose prices and volumes show unusual market movements should be encouraged to appoint a "sponsor" on an adhoc basis with responsibilities to ensure that the said issuer comply with the listing requirements.

The surveillance and enforcement machinery of the stock exchange has, with few exceptions yet to prove itself effective to regulate insider trading. The rules while significant in themselves lack the requisite teeth to provide a significant deterrent. The monitoring of the market and shareholdings is a necessary concomitant to effective regulation which to date does not exist.[60]

Does the public have an erroneous but honestly held belief about the Listing Requirements. It is

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[60] Philip N.Pillai in Insider Trading in Singapore and Malaysia [1974] 16 MLR 333 at p.373.

suggested that the Kuala Lumpur Stock Exchange should clarify the rules and make known the Kuala Lumpur Stock Exchanges attitude to the market to enable the participants to adopt its practices so as to comply with the laws.

At present there is a good interplay of self-regulation and regulation in the workings of the securities market whereby the Kuala Lumpur Stock Exchange assume a self-regulatory role. To rid the market of insider trading it is imperative that the Kuala Lumpur Stock Exchange should adopt preventive measures to ensure that each issuer comply strictly with the Listing requirements relating to insider trading that would not impose an unreasonable burden on the issuer.

CHAPTER 4

THE REGULATORY AUTHORITIES

4.1 THE Securities Commission

4.1.1 Introduction

The Securities Commission is an independent statutory body vested with powers under the Securities Commission Act 1993.[1]

The objectives of setting up the Securities Commission are to promote and maintain the integrity of the capital market, and to instill the confidence of the investors in the securities market. The Securities Commission, to achieve its objectives not only regulates the securities laws but also encourages and promotes self-regulation by those bodies involved in the securities market. In its regulation of the securities industry under the Securities Commission Act 1993,the Securities Commission regulates all matters relating to securities such as takeovers and mergers of companies. It supervises and monitors the activities of any exchange, clearing house and central depository as well as suppress illegal, dishonourable and improper practices in the dealings in securities. This is to ensure that all persons involved in

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[1] Act 498.

the securities market comply with the laws of the securities. It also considers and makes recommendations for the reform to the laws relating to securities.[2]

The functions of the Securities Commission are carried out by the various divisions such as The Issues and Investment Division, the Market Supervision Division[3], the Research and Development Division, and the Legal and Public Affairs Division.

The Department of Surveillance and Compliance in the Market Supervision Division of the Securities Commission monitors the trading activities of share trading on the Kuala Lumpur Stock Exchange. They also maintain a close liaison with the Advance Warning and Surveillance (AWAS) and Listing Departments of the Kuala Lumpur Stock Exchange. An electronic monitoring system was set up in

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[2] Section 15(1)(j) of the Securities Commission Act 1993.

[3] In the Securities Commission Annual Report 1993 the offences investigated by the Securities Commission include shortselling under section 41(1);12;13;89 and 90 of the Securities Industry Act 1983. In the Securities Commission Annual Report 1994 the offences under investigation include illegal dealing, merger and takeover, insider trading and abuse of information. In the Securities Commission Annual Report 1995 the offences relating to 87(c) and section 87A of the Securities Industry Act 1983 were charged in court. In the Securities Commission Annual Report 1996 the offences prosecuted includes short-selling, making misleading statement and insider trading.

the department using trading information from the Kuala Lumpur Stock Exchange to better monitor the trading activities in the market place.

Since the establishment of the Securities Commission in 1993 the principal thrust of the regulatory frame work of the Securities Commission is merit based. The Securities Commission mandates that all proposals involving issues or offers of securities to the public be subject to the Securities Commission's prior approval. The proposals of each issuer are supported by facts and figures to justify that the issuer fulfilled both qualitative and quantitative terms as set out in the Securities Commission's guidelines of initial public offering for securities or further issue of securities.

The increasing importance of the capital market as a place to raise funds for the public companies is evidenced by the growing number of initial public offerings and other capital raising proposals. At present the Securities Commission has geared the regulatory framework towards a disclosure based regulation. A disclosure based regulatory system entails the making of investment decision of each prospective investor based upon complete and reliable information provided by the issuer or offeror of securities. The disclosure based regulation demands a

higher standard of disclosure, due diligence and corporate governance as well as accountability by public listed companies and their advisers to investors.This is to ensure that the information disclosed by the issuer at all times is sufficient,timely, and that there is no material omission of material information from the securities market. How does the Securities Commission monitor the issuers so that the issuers will publish all material information at any time, and will not omit any material information to the member of the investing public?

For such a regulatory framework to work, it requires both the promoters and their advisers to exercise a higher degree of duty of care and due diligence, when preparing the prospectus for potential investors. An investor need to ensure that before any investment is made, he has made an indepth evaluation of the information provided to him.[4]

In Australia the Australian Securities Commission is set up under the Australian Securities Commission Act (Cth) 1989. It is responsible for enforcing the securities laws in the national scheme law such as the Corporations

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[4] This emphasises the importance of the role of the Securities Commission in monitoring the existing issuers of listed, transferable securities on the disclosure of material information and the omission of material information.

Act 1989 (Cth), the Corporations Law 1991 and the Australian Securities Commission Act 1989.

As compared to the Securities Commission of Malaysia, the Australian Securities Commission, amongst others also carry out the same functions such as to supervise and monitor the activities of the stock exchanges, clearing houses, central depository etc, and to ensure that all bodies involved in the stock exchange complied with the securities laws.

4.1.2 Enforcement of the Securities Laws

The Securities Commission enforces the laws on insider trading under section 89 and 90 of the Securities Industry Act 1983 and the Malaysian Code on Takeovers and Mergers contained in the Securities Commission Act 1993.[5]

In the cases relating to securities laws in

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[5] The Securities Commission has stipulated in the Policies and Guidelines on Issue or Offer of Securities that non-compliance with their rulings, or failure to discharge due diligence and responsibilities expected of the public companies, advisers, experts or disclosure of false, misleading, deceptive statement or material omission in its submission to the Securities Commission may cause the Securities Commission to issue cautious letter, reprimand letter, impose a moratorium, or prohibit trading or dealings in securities issues, or issue a public statement that the retention of the office by that director of the public companies is prejudicial for the interest of the investing public.

particular insider trading, the Securities Commission has investigated a case and charged a person named Chua Seng Huat in the Kuching Sessions Court, Sarawak under section 89 and 90 of the Securities Industry Act 1983.[6]

To enforce the Code on Takeovers and Mergers, the Securities Commission issue rulings to implement the letters and spirit of the Code. This includes the interpretation of the Code, the practice and conduct of persons involved in the transactions of securities and such other matters relating thereto. However the Securities Commission may in certain circumstances grant exemptions to the Code[7] to certain issuers under certain circumstances.

4.1.2.1. Investigation

If a person contravenes section 89 or 90 of the Securities Industry Act, the Securities Commission [or Registrar of Companies] will investigate the suspected cases of insider trading, and later prosecute the offenders.

In the enforcement of the provisions in the Code of Mergers and Takeovers and the rulings of the Securities

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[6] The Registrar of Companies is also empowered to enforce the securities laws under the Securities Industry Act 1983 but its role has been taken over by the Securities Commission since 1995.

[7] Section 33C and section 33A(5) of the Securities Commission Act 1993.

Commission on the Code, the Securities Commission may either take actions under section 33 D (1) of the Securities Commission Act 1993, or alternatively charged the person in court. If a person fails to comply with the Code or the rulings, the Securities Commission may give directions under section 33(D) to the person in default to secure compliance with the Code and rulings; impose a penalty for non-compliance, reprimand him, or direct a stock exchange to prohibit the person in default from dealing in the securities in the stock market of the stock exchange, or if the person in default is a listed corporation, direct the stock exchange to suspend trading in its securities or to suspend the listing of the corporation, or to delist the corporation.

It appears that the Securities Commission may employ section 33D(1) of the Securities Commission Act 1993 in cases of suspected contraventions of the rulings and the Code, and only charge the person in court in blatant cases of breach of the Code and rulings.[8]

The investigating officer in the Securities Commission has the powers to investigate any offences under

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[8] The provisions in the Code and the rulings should be made clear and precise in its interpretation in the event of a court case, if not it will cause ambiguity and problems in its interpretation in a court of law.

the securities laws.[9] In the course of its investigation he may by notice in writing require any person to produce to him the books, documents etc. It is not expressly stated in the law that the person to whom the notice was served, must be related to any issues on the body corporate or securities that they are investigating.[10] If the investigating officer wishes to examine any person who is acquainted with the facts and circumstances of the case under investigation, he may by notice in writing require him to appear before him to be examined orally, and his examination will be reduced into writing.[11]

In Australia the Australian Securities Commission has the powers to conduct investigation into any contravention of a national scheme law, the Commonwealth or State laws, that concern the management of the affairs of a body corporate, or matters relating to fraud and dishonesty in securities matters.

Under section 33 of the Australian Securities Commission Law, the Australian Securities Commission may by a notice in writing require any person to produce the books that relates to the affairs of a body corporate, and found

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[9] Section 35 of the Securities Commission Act.

[10] Section 36(2) of the Securities Commission Act.

[11] Section 38 of the Securities Commission Act.

in that person's possession. In *ASC v Zarro & Ors*[12] the ASC served a notice under section 33 requiring Westpac to produce certain documents relating to one of its customers, Zarro. When Westpac failed to comply with the notice from the Australian Securities Commission, the Australian Securities Commission obtained a court order to enforce compliance with the notice. The Federal Court upheld the validity of the notice to produce documents and ordered Westpac to produce the documents.

In *ASC v Lucas*[13] the Australian Securities Commission served a notice on the auditors of a particular company and its subsidiaries to produce certain documents. In the notice of the Australian Securities Commission, the Australian Securities Commission did not stipulate the documents required by them. Yet the Federal Court ruled that the auditors have to comply with the notice unless the auditors can affirmatively prove that the notice was not exercised for that legal purpose or that it was served in bad faith.

In the Australian Securities Commission Laws, the Australian Securities Commission may, by a notice in writing to the person involved in the matter, gain access

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12 (1992)10 ACLC 11

13 (1992)10 ACLC 888.

to the book relating to the affairs of the body corporate.

"Reason to suspect and reason to believe"

Under section 36(1)(b) of the Securities Commission Act 1993 an investigating officer of the Securities Commission may enter into any place when he has reason to believe that an offence has been committed against the securities laws. However in the securities Industry Act 1983 section 99 the Registrar of Companies may commences investigation if he has reason to suspect that an offence has been committed. The words "entitled to inspect" in section 36(4) of the Securities Commission Act should be redefined to include those persons who are aggrieved by those persons who failed to comply with the rules of the stock exchange.

In the case of *Tan Eng Hoe v AG of the Straits Settlement*[14] a wrongful arrest was committed by the Police. The Police arrested the accused whose habits and movements fit the description of the suspect wanted by the Police for the offence of cheating. The court held that any reasonable man under the prevailing circumstances would have fairly suspected the accused as the person who had committed the offence under the investigation of the

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14 [1933] MLJ 151.

Police.

In *Shaaban & Ors v Chong Fook Kam & Anor*[15] a case of false imprisonment, the court held that the Police were entitled to arrest if a reasonable suspicion exist of the respondents (that is the accused) being concerned in the offence of reckless driving and dangerous driving causing death. It is unnecessary for the Police to show a prima facie case of such offence before the respondents were arrested and detained by the police. Lord Diplock in his judgement stated that suspicion in its ordinary meaning is a state of conjecture or surmise where proof is lacking.

It is submitted that since an investigation may be carried out by an investigating officer when he has reason to believe that an offence will be committed, or when he has reason to suspect that an offence has been committed, the law under section 36 (b) of the Securities Commission Act should distinguish the prevailing circumstances whether an offence is committed or about to be committed.

In Australia under the Australian Securities Commission Law whenever the Australian Securities Commission has reason to believe that a contravention may

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15 [1969]2 MLJ 219.

have been committed or a belief that there may have been a contravention of one of the relevant laws as such a national scheme law etc., the Australian Securities Commission may commence investigation.

In *Little River Goldfields NL & Anor v Moulds & Ors*[16] the court stated that so long as the Australian Securities Commission has reason to suspect that a contravention did occur, it does not have to commit any matter in writing or to set out the grounds upon which it has reason to suspect a contravention in its investigation of the case.

In *Queensland Bacon Pty Ltd v Rees*[17] Kitto J. observed that a suspicion that something exists is more than mere idle wondering whether it exists or not. It is a positive feeling of actual apprehension or mistrust, amounting to a slight opinion but without evidence.

In *Sim v NCSC*[18] the Supreme Court of Victoria held that it would be difficult to form a suspicion that an offence has been committed without having in mind one or more provisions in respect of a breach of which the

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16 (1992) 10 ACLC 121.

17 (1996) 5 CLR 226.

18 (1988) 6 ACLC 516.

suspicion is entertained.

It appears that based on the laws in Malaysia and Australia pertaining to investigation of securities matters an investigating officer should have reason to suspect that an offence has been commited before he can commence an investigation and not otherwise.

4.1.2.2 Disclosure of information

Under section 36(4) of the Securities Commission Act an investigating officer may permit any person to inspect any account, books or other document seized and taken in possession of by him if such person is 'entitled' to inspect such account, book or document under this Act. The person who is entitled to inspect such accounts may refer to the person who wishes to commence civil proceedings in the matter.[19]

Disclosure of information by the Securities Commission may be made to the police, a public officer or to foreign authorities involved in securities as the Securities Commission thinks fit.

Can the Securities Commission disclose information on the beneficial shareholdings in an issuer to

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[19] In section 43(1) of the Securities Commission Act 1993 the Securities Commission should not disclose information except for civil proceeding under any law.

any holder of the shares in that particular issuer? In the Companies Act 1965 the Registrar of Companies has the power under section 69A to enquire into the beneficial shareholdings in a particular issuer to verify the identity of the owner of the shares when the need arises. But there is no provision in the Companies Act 1965 to enable the Registrar of Companies to disclose information relating to the beneficial ownership of shares to any third party who is interested in the information.

In Australia, under the Corporations Law 1991,[20] the Australian Securities Commission may supply information to the holder of securities if he requests for any information relating to the securities. The Australian Securities Commission may issue a primary notice to the holder of the voting shares to find out the identity of the actual owner of the shares. If the holder of the shares revealed that he is the trustee of the shares for a particular beneficiary, then a secondary notice will be issued by the Australian Securiities Commission to the party concerned. A person requesting the Australian Securities Commission to give a primary or secondary notice, may withdraw the request at any time. However the Australian Securities Commission may reject such a request for information if it is satisfied that such information

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[20] Section 717 to 724 and 742.

should not be given or that it should be given in a particular form.

Under section 25 (1) of the Australian Securities Commission Law, the Australian Securities Commission may disclose the information obtained to the person if the person can satisfy the Australian Securities Commission that he is contemplating a proceedings in respect of the matter.

Disclosure of information may be made by the Australian Securities Commission to the authorities related to securities such as the Takeover Panel, the Auditors and Liquidators Disciplinary Board and other bodies if the Australian Securities Commission is satisfied that such information will assist them.

No doubt there are express provisions in the Securities Commission Act which provides for the examination of persons suspected to have committed a contravention of the securities laws or connected with the act of contravention. However there is no provisions in the laws that enables the Securities Commission or the Registrar of Companies to conduct hearings both public or private on the matters relating to securities.

In Australia, under section 51 to 59 of the Australian Securities Commission Laws, the Australian

Securities Commission has the power to hold both private and public hearings where the Corporation Laws requires such a hearing. Such hearing may be conducted in camera where all matters disclosed are confidential and the members of the Commission have the power to summon any persons to attend the hearing and give evidence or produce documents. The hearings are conducted with as little formality and technicality as possible as long as the rules of natural justice are observed and the Australian Securities Commission is not bound by the formal rules of evidence.

It is suggested that in circumstances where there is a necessity that informal hearing be conducted to resolve certain matters that arise in securities matters, the securities laws should provide for such contingencies.

Under section 37 of the Securities Commission Act 1993 the Investigating Officer shall enter any premise by search warrant. If he reasonably believed that any object, accounts, material thing etc may be interfered with or destroyed, he may enter the premise without a search warrant.

In Australia sections 31 and 33 of the Australian Securities Commission Commission Act provide that if the

Australian Securities Commission has reasonable ground to suspect that books etc have not been produced pursuant to a notice given under any provisions of the Act, the Australian Securities Commission shall obtain a search warrant to seize the documents etc.

Section 38 of the Securities Commission Act 1993 states that an examinee shall be legally bound to answer all questions and shall not refuse to answer any questions on the ground that it tends to incriminate him.

Under section 68(1)(a) of the Australian Securities Commission Law it is not a reasonable excuse for a person to refuse or fail to give information on the basis that the information might tend to incriminate him or make him liable to a penalty.

It is submitted that both the Malaysian Securities Commission Act and the Australian Commission Law have abolished the privilege against self-incrimination accorded to a person who gives evidence under the common law.

4.1.2.3 Prosecution

Under section 39(2) of the Securities Commission Act, any officer of the Securities Commission authorised in

writing by the Chairman of the Securities Commission may conduct any prosecution of any offence under this Act.

In Australia under section 39(2) of the Australian Securiites Commission Law the Commission can initiate prosecutions for a criminal offence where an investigation reveals contravention of the securities law.

Under subsection 152(i) of the Criminal Procedure Code the Prosecution has to frame charges to meet the legal requirements of the law. To frame charges the Prosecutor has to rely on direct evidence and indirect evidence in the case. In an insider trading case of *Public Prosecutor v Chua Seng Huat* in the Sessions Court, Kuching which is fixed for hearing on the 17th March 1997, Chua Seng Huat was charged under section 89 and 90 of the Securities Industry Act 1983 in that he made improper use of the information on the financial standing of the Kim Hin Group, if published and released, would affect the prices of securities, by disclosing the information to Kim Hin (Malaysia) Sendirian Berhad in their two transactions of 1,200 lots of shares and 200 lots of shares in Kim Hin Industry Berhad respectively.[21]

If the prosecution were to frame charges for the

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[21] See Appendix I

insider-tipper and the tippee it is extremely difficult, or if not impossible to do so under the present state of the laws under the Securities Industry Act 1983.[22]

When drafting charges, magistrates and prosecuting officers should bear in mind the advice of Thomson J. given in the case of *Public Prosecutor v Leong Yoon Meow*.[23] His Lordship held that where an accused person is alleged to have done cannot be described in the language of any statutory provisions creating an offence, or where it seems to depart from the language in the section in framing the charge, then the chances are that no offence has been committed.

Lynda M.Ruiz stated that clarity regarding the prohibition of insider trading will facilitate more precise discovery requests and less waste during SEC investigation.[24]

Mr. Kilsby, the Director of Market Services at the Stock Exchange, City of London commented that good quality regulation is absolutely vital to ensure confidence

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22 See Chapter 2 on the elements of the offence of insider trading.

23 [1953] MLJ xxxv.

24 In the European Community Directive on Insider Trading: A Model for Effective Enforcement of Prohibitions on Insider Trading in the international securities market in 33 Col,J. Transnational 229.

for all market users and to give investors the protection they deserve.[25]

In an insider trading case where direct evidence is absent, the Prosecution should take into consideration the court's decision in *Waldron v Green*.[26] There the court held that where direct evidence is absent and reliance is on circumstantial evidence, the fact that the sale took place after the accused acquired the information is not sufficient to establish insider trading. Mc Inerney J. observed that something more than mere sequence in point of time of the gaining of the information and of the sale is required in the case. The mere occurrence of two events in sequence one to another does not establish causation. In the absence of other evidence, the inference of causation is at best an inference of equal degree of probability with the inference that the two events are not causally connected.

Where the tipper and tippee are involved in an insider trading case, the prosecution has to consider the question of causation as stated in *Leyland Shipping Co. Ltd v Norwich Union Fire Insurance Society Ltd.*[27] The court

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[25] Times Newspaper, London September 9th 1996.

[26] (1977-78) 3 ACLR 289.

[27] [1918] AC 350 at p.369.

commented on the question of causation, in that to treat the prima causa as the cause which is nearest in time is out of question. Causes are spoken of as if they were distinct from one another as beads in a row or links in the chain, but if this metaphysical topic has to be referred to, it is not wholly so. The chain of causation is a handy expression, but the figure is inadequate. Caustion is not a chain but a net. At each point influences, forces, events, precedents and simultaneous meet; and radiate from each point infinitely. At the point where these various influences meet, it is for the judgement based on the matter of fact to declare which of the causes thus joined at the point of effect was the proximate and which was the remote cause. The prosecution may have to apply common sense standards to determine the real or efficient cause from the whole complex of facts made available from any suspected cases of insider trading. In *Chan Chwen Kong v Public Prosecutor*[28] Thomson CJ observed that in cases where the evidence is wholly circumstantial, what has to be considered is not only the strength of each individual strand of evidence but, also the combined strength of these strands when twisted together to make a rope.

4.1.3 Immunity from Liability

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[28] [1962] 28 MLJ 307.

Under section 44A of the Securities Commission Act, the chairman and any officer of the Commission shall not be liable to any action or proceedings from damages for or on account of or in respect of any acts done or statement made, omitted to be done or made in pursuance of or in execution of a securities law etc. provided that such act, statement, performance of function or exercise of power was done in good faith. In *Public Prosecutor v Tunku Mahmood Iskandar*[29] the court held that a person is in the act of good faith if the person can show that he had reasonable ground for believing that he ought to do what he did. In *Little v Commonwealth*[30] Dixon J. stated that protective provisions requiring notice of action, limiting the time within which actions may be brought or otherwise restricting or qualifying rights of action have long been common in statutes affecting persons or bodies discharging public duties or exercising authorities or powers of a public nature. "In provisions of this kind, it is common to find such expressions as 'act done in pursuance of this section' or 'statute', 'anything done in execution of this statute', or 'under and by virtue of a statutory provisions'. Such enactments have always been construed as giving protection, not where the provisions of the statute have been followed, for then protection would be

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29 [1977] 2 MLJ 123.

30 (1947) 75 C.L.R. 94 at 108.

unnecessary, but where illegality has been committed by a person honestly acting in the supposed course of the duties or authorities from the enactment."

Under section 40 of the Securities Commission Act all members of the Commission or any of its committee or any officer, servant or agent of the Commission while discharging their duties as such members, officers, servants or agents shall be deemed to be public servants within the meaning of the Penal Code.

No doubt it is expressly stated in the Securities Commission Act[31] that officials of the Securities Commission are not liable for actions if they acted in good faith and that they are deemed to be public servants, it is submitted that the enforcement of the securities laws should be carried out by the office of the Registrar of Companies, but placed under the control of the Securities Commission. The reason is that the enforcement of the securities laws may involve both the national level and the international arena. Since the Securities Commission is a mere statutory body, and not a public body, it is not

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[31] Section 126A of the Securities Industry Act 1983 provides that no person shall be liable to be sued in any court for any act or matter done or ordered to be done or omitted to be done, by him in good faith and in the intended exercise of any power or performance of any duty, conferred or imposed on him by or under this Act.

entitled to the full protection of a government body,[32] and thus it may be susceptible to civil suits by the affected parties which render its enforcement works difficult and cumbersome in the process.

Under the rule of law and the philosophy of separation of powers, the law makers or the policy makers can only make laws and policies, but the laws should be implemented by another body to provide the check and balances in the system of administration of laws.

It is clearly mentioned in the Securities Industry Act 1983 that the officers of the Securities Commission and the Registrar of Companies are involved in the enforcement of the laws. In the enforcement of the laws on securities, it may be pertinent for the Securities Commission to make fast decisions and also to exercise certain discretion in its exercise of its powers. Such powers may be subject to judicial review by the court. Can the Securities Commission be represented by a representative who informed the court, his reasons for the decision or the reasons of all "the members" in the Securities Commission which made the decisions. To provide

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[32] See the Government Proceedings Act, 1956 (Act 359), the Public Authorities Protections Act, 1948 (Act 1998), Specific Relief Act 1950 (Act 137) and Order 73 of the Rules of the High Court 1980.

uniformity, ease of reference and to facilitate the easy enforcement of the laws, it is submitted that the various persons mentioned in the Securities Industry Act 1983 to carry out the enforcement of the laws be designated respectively as Controller of Securities, Deputy Controller of Securities, Assistant Controller of Securities and Inspector of Securities etc.[33]

4.1.4 Preventive Actions

Prior to the listing of each issuer on the official list of the Stock Exchange, the Commission will scrutinize the character of its directors and its management. As for the intermediaries involved in the securities industry such as dealers, dealers' representatives, investment advisers etc. their operations are controlled by their licence issued under strict conditions on their dealings and the keeping of records.[34]

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[33] An analogy can be drawn with the office of the Attorney General. In law, the Attorney General is the Public Prosecutor but for purpose of the administration of the office, he is the Attorney General. In law the Chairman may be the Controller of Securities, but in administration of securities matters, he is the Chairman of the Securities Commission.

[34] On 4th September 1995 the Licensing Oficer, Ministry of Finance charged Teh Hooi Hong for breach of licensing conditions under subsection 21(2) of the Securities Industry Act 1983. Teh infringed conditions of her licence as dealer's representative by providing her clients with facilities to trade in a place other than the principal place of business. Teh was fined RM 50,000.00.

To prevent insider trading the Securities Commission should indirectly enforce the policy of the Kuala Lumpur Stock Exchange pertaining to the timely and accurate disclosure of material information. In this respect the Securities Commission have issued guidelines[35] which must be adopted by the listed public companies as rules, prohibiting the directors or those connected with them, with access to or privy to price sensitive information, from trading in securities of their listed companies commencing from one month before the announcement up to one market day after the announcement of matters involving unpublished, price sensitive information (or where relevant, matters on any other listed public companies. As for the release of the financial results of the company, the directors cannot deal in securities during the period commencing from the expiry of the financial year, half-year or quarter year up to one market day after the announcement of the company's results for the financial year, half year or quarter, and/or of any dividends or distributions to be paid or approved. As for negotiations on corporate proposals, the directors are prohibited from dealing in securities for the period from the commencement of negotiation for a corporate proposal up to one market day after the announcement, or one market day after the

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[35] See Chapter 5 of the Policies And Guidelines On Issue Or Offer Of Securities.

abortment of negotiations, whichever is applicable. But the directors may seek exemptions from compliance with the guidelines in circumstances such as when they exercise the options and rights under an employee share scheme and share option scheme; or when they accept an entitlements under an issue or offer of securities; or they act in pursuance of a takeover offer. However in the aforesaid guidelines a director shall not be liable for insider dealing when he deals in securities during the prohibited period if he obtained the clearance to deal in securities from the Board of Directors, or the Chairman of the issuer of the said securities, accompanied with an announcement on the particulars of dealings to the Kuala Lumpur Stock Exchange.[36] Such guidelines remain in force to assess its effectiveness in curbing insider dealing. It is submitted that the Securities Commission should formulate rules in the Securities Industry Act 1983 to prohibit sale and or purchase by the directors during certain prohibited period and impose a penalty in breach of such rule.[37]

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[36] He has to make a declaration that he is not in pssession of unpublished price sensitive information prior to and at the time of his dealings in securities.

[37] In the Securities Industry Act 1983 the rules governing the operation of the exchange are set by the stock exchange in question subject to the approval of Securities Commission and the Minister.There is no provision in the Securities Industry Act 1983 that enables the Securities Commission to formulate the rules governing the working of the stock exchange.

4.1.4.1 Disclosure

The principle behind the disclosure-based regulatory structure as mentioned earlier, is the need for the issuers or offerors of securities to provide the investors with sufficient and accurate disclosure of all relevant information pertaining to the company's matter to enable investors to make their own informed investment decisions, and the need to disclose adverse situations or known risks connected with the securities being issued or offered to the market. The Securities Commission advocates continuous disclosure of information to facilitate investment in an informed manner, and that public listed companies should take a more pro-active approach to continuous disclosure of information. It is suggested that the issuer's present practice of reporting to the Stock Exchange on any material developments of the issuer should be followed by a copy of its report to the office of the Registrar of Companies under the issuer's records for public inspection.

4.1.4.2 Surveillance

Effective surveillance and enforcement by the regulators would be crucial to maintain the integrity and honesty of the stock market under a disclosure based regime. Proper surveillance procedures would need to be put in place to check and verify the information disclosed

in the prospectus. This surveillance procedure should be followed by the effective enforcement for contraventions of the laws of securities.

Whenever there is unusual market movements in the share price, the directors of the issuers should be summoned by the Securities Commission to make statements on the latest development in the issuer. Such statements of the directors should be published in the newspaper. If the directors should make a false statement, or omit to state a material fact in answer to the examination by the Securities Commission, the directors should be charged under section 38 of the Securities Commission Act.

4.1.4.3. Other Actions

Moreover the Securities Commission should introduce a civil provision in section 87A of the Securities Industry Act 1983, in that a person may claim compensation for any loss or damage he had suffered if he relied on a statement which was materially misleading or there was a material omission in the statement. A misleading statement does not include a statement of intention of a future promise because the statement is neither true or false at the time it is made. In *Becker v Cohen*[38] the Division Court in interpreting the false

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[38] [1973] 1 ALL ER 120.

and misleading statement under section 14 of the Trade Descriptions Act 1968 held that this provision did not apply to statements made in regard to the future.

It is arguable that the defendant should be entitled to have a defence that at the date he published the statement he believed on reasonable grounds that the false or misleading statement was not false or misleading, and in the case of an omission of material matter, he did not know that the omission was material at that particular time, and that when he became aware of the misleading, false fact or omission of facts in his statement he had given reasonable notice to correct the deficiencies in the statement.[39]

In Australia, section 1001A of the Corporation Laws provides that the issuer who, intentionally, recklessly, negligently fails to notify the securities exchange of information that is not generally available (and that a reasonable person would expect, if it were generally available, to have a material effect on the price or value of the securities) commits an offence.

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[39] Section 33E(1) of the Securities Commission Act provides a defence that the person in default did make reasonable inquiries on the information and did believe in the truth of the information till the submission of the information to the Securities Commission.

In the United States of America the Securities Exchange Commission has to rely upon Rule 10b-5[40] made under section 10b of the Securities Exchange Act 1934 (which is in pari materia with section 87A of the Securities Industry Act 1983) to charge insiders for insider trading.[41]

The Securities Commission should refer cases suspected to be insider trading but involved criminal breach of trust under section 405 and 409 of the Penal Code to other authorities such as the Office of the Inspector General Of Police and Bank Negara of Malaysia.[42]

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[40] Rule 10b-5 provides that it shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails or of any facility of any national securities exchange to employ any device, scheme, or artifice to defraud; to make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statement made, in the light of the circumstances under which they were made, not misleading, or to engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person, in connection with the purchase or sale of any security.

[41] Among the cases of insider trading are *SEC v Texas Gulf Sulphur* [401 F 2d 833 (1968)]; *Shapiro v Merrill Lunch* [495 F 2d 28F (1980)]; *Chiarella* [588F 2nd 1358 (2d Cir 1978); rev'd,100 S Ct.1108(1980)].

[42] The Star Newspaper March 15th 1997 quoted a report from the Asian Wall Street Journal that on the 14th March 1997 Bank Negara was investigating Pacific Bank Berhad,an issuer listed on the Kuala Lumpur Stock Exchange on its unusual movements in the price and volume of shares traded on the exchange just prior to a merger announcement in 1996.

4.1.5. Civil Proceedings

There is no provisions in the securities laws[43] that enables the Securities Commission and the Registrar of Companies to take civil actions, on grounds of public interest, for or on behalf of the issuer and an aggrieved party in an insider dealing transaction against any person suspected of contravening the laws on insider trading. The Securities Commission may commence a civil action, on grounds of public interest, on behalf of an aggrieved participant in the stock market, whose transaction was tainted with insider dealing, through a writ of summons in the courts for all gains made or losses avoided by an insider in insider dealing. However in such civil proceedings, the Securities Commission may face the problem of "causation" or "remoteness of damages" in a contractual claim. If the insider were to sell securities to a participant in the stock market, there is no privity of contract between the parties. Section 19(1) of the Contract Act 1950[44] provides that consent to an agreement was caused by coercion, fraud or misrepresentation, the contract is voidable at the option of the party. In a stock market, a participant's purchase of securities is not caused or induced by any fraud, coercion or misrepresentation under the common law. Provided that the

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[43] The securities laws refers to the Companies Act 1965, the Securities Commission Act 1993 and the Securities Industry Act 1983.

[44] Act 136.

court is prepared to establish the relationship between the insider and the participant based on the "test of contemporaneity", an aggrieved party has no cause of action. As for the insider, who purchases securities in an insider dealing transaction, from a shareholder, one may establish the relationship of insider-shareholder between the parties. The aggrieved party may join with the company in an action for restitution and/ or breach of confidence or breach of fiduciary duty to the issuer.

The Securities Commission and the Registrar of Companies merely concentrate on the criminal matters in the securities laws that affect the public interest at large.The Securities Commission has emphasised in its annual report 1996 that it intends to push for wider recognition of civil remedies such as restitution and disgorgement of illgotten gains for the violations of securities laws.

However in Australia, the Australian Securities Commission has taken the initiative to be involved in the civil proceedings that is, to recover damages for fraud, negligence, breach of duty or other forms of misconduct committed in connection with securities matters. The Australia Securities Commission may commence proceedings in the name of the Company (that is without the consent of the Company) against the directors of the Company who had committed a breach of their fiduciary duties. The

Australian Securities Commission may also commence proceedings in the name of any shareholder or creditor (if he consents to it) in a civil case against any person who had committed an offence relating to securities laws.

4.2 The Registrar of Companies

4.2.1 Introduction

The office of the Registrar of Companies is the keeper of both financial and non-financial records under the Companies Act 1965[45] for both listed and unlisted companies. If an investor wishes to search for any information on the companies, the first place of reference is the office of the Registrar of Companies.

The file of each listed issuer in the Registrar of Companies contain information relating to its prospectus, its annual accounts showing its assets and liabilities, profits and losses, its management and its future prospects.

4.2.2 Centre of Information for Listed Issuers.

Certain matters are required under the securities laws and listing requirements of the Stock Exchange to be included in the prospectus of each issuer. Such matters include introductory matters on the issuer: its corporate directory; share capital; particulars of initial offering;

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[45] (Act 125).

directors; management and staff, AND financial matters such as the consolidated balance sheet, accountants reports, directors' report, statutory and other general information, AND lastly procedure for application and acceptance.

Under section 46 of the Companies Act 1965 the directors and the promoter or those persons who authorised, or caused the issue of the prospectus shall be liable to pay compensation to all persons who subscribe for or purchase any shares or debentures in the issuer for damage sustained by reason of any untrue statement therein or by reason of wilful non-disclosure therein of any matter of which he had knowledge, and which he knew to be material. He shall be guilty of an offence unless he proves either that the statement or non-disclosure was immaterial, or that he had reasonable ground to believe and did, up to the time of the issue of the prospectus, believe the statement was true, or the non-disclosure was immaterial.[46]

The prospectus, being the principal public document of an issuer based on which their securities are offered to the public, may need to be revised in contents tc meet the disclosure requirements in the relevant laws that is Securities Industry Act 1983, the Securities Commission Act 1993 and the Companies Act 1965 pertaining

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[46] See section 47 of the Companies Act.

to disclosure of information .This will ensure that there is stricter disclosure requirements on the part of the issuers.[47] The new Policies and Guidelines on Issue or Offer of Securities (Guidelines) released by the Securities Commission on 18th December 1995 reveals maintenance of high standard of disclosure as well as due diligence and professional responsibility expected of promoters, directors and management of public companies and their corporate advisers.[48] Moreover Part IV Division of Securities Commission Act on proposals in relation to the issue of offer of securities emphasise full and accurate disclosure and clear penalties for misrepresentation.

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[47] The present rule of disclosure under the Continuing Listing Requirements of the Kuala Lumpur Stock Exchange Corporate Disclosure Policy merely provides that the issuer should immediately release information in a timely fashion to the investing public. There are instances in which issuers have had not complied with such requirements. Among the cases is Ho Wah Genting Berhad Officials were asked by the Kuala Lumpur Stock Exchange to explain why it had not practised timely corporate disclosure on its acquisitions in Singapore's Horiguchi Engineering. Even an official of the Securities Commission in the Star Newspaper dated 19th May 1995 states that the annual reports of Malaysian Corporations have scant information on financial instrument activity and their disclosure were minimal to the point of non-existence where there is disclosure, it comes in the form of contingency note which reader of the report are in doubt of its contents.

[48] The new policies and guidelines will enable the parties concerned to have a better appreciation of the role of the Securities Commission and also to emphasise the importance of due diligence and professional responsibility of the corporate advisers, promoters, directors and management .of public companies and to maintain high standard of disclosure and accounting standard.

In Australia, under section 1023B and 1024 of the Corporations Act 1989 whenever the company is aware that there is a significant change affecting a matter included in the prospectus, it must lodge a supplementary or replacement prospectus. A company which fails to comply with these sections commits a criminal offence under Section 1312. The information contained in the supplementary prospectus is taken to be included in the original prospectus under section S1024(c). A replacement prospectus can be used to correct deficiencies and provide information about any new matters whether they are significant or not, and to be taken to have been issued when the original prospectus was issued under section 1024(D).

A cursory glance of the prospectus of a few issuers such as Kwantas Corporation Berhad, Bina Puri Holdings Bhd. and ACP Industries Berhad showed that in general, these issuers used the same terms for certain subject matter mandated in the prospectus but the matter are differently itemised. In the abridged prospectus under the Fifth Schedule-A of the Companies Act, the full names, addresses and occupations of all directors, managers and secretaries is referred to in item 8. In the prospectus of Kwantas Corporation Berhad, the particulars relating to the directors, managers, secretaries are classified as under item 8.7. In the prospectus of Bina Puri Holdings Bhd. the particulars relating to directors are classfied as

"Directors, Management and Employees" under item 7.8. Whereas for ACP Industries Berhad the particulars relating to directors are classified under item 7.[49]

To provide easy reference to the investors on the matters as aforesaid, it is imperative that the Registrar of Companies devises or makes it mandatory that such matters be classified under standard terms and standard item numbers.

It is suggested that particulars relating to directors etc. should be classified as "Directors, Mangement & Employees" only and not any other phrase to avoid any confusion in the later search for information on the nature of management of the issuer.

4.2.3 State of Financial Affairs

Under section 169(3) of the Companies Act the directors of every company shall cause to be made out, and to be laid before the company at its annual general meeting with the profit and loss account and a balance sheet as at the date to which the profit and loss account is made up. The balance sheet shall give a true and fair view of the state of affairs of the company as at the end of the period to which it relates, and every profit and loss account shall give a true and fair view of the profit and loss of

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[49] See Appendix 2.

the company for the period of accounting as shown in the accounting and other records of the company.[50]

P.W. Wolnizer spoke on the Companies Act 1981 (Cth) and stated that the Act does not specify what technical properties on account must possess in order to provide "a true and fair view " of a company's state of affairs and thus the disclosure provisions of the Act is open to various interpretations in regard to the technical properties of the accounts prepared under the Act.[51]

It is observed that the state of the financial position of each issuer available at office of the Registrar of Companies is at one point of time and thus it may not be up to date at any time when an investor wishes to search for its latest financial position. To overcome this problem under the present state of affairs, the issuer is supposed to make immediate public disclosure of all material information concerning its affairs under section 335 of the Continuing Listing Requirements of the Kuala Lumpur Stock Exchange. However under the Companies Act it is not mandatory for the issuer to file in the latest developments in its affairs in the office of the Registrar

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[50] See section 169(14) of the Companies Act.

[51] In Correspondence with the facts - A recurrent theme in commentaries on the statutory quality standard of truth and fairness in accounts in C & SL 1985 at 148

of Companies.[52]

Gower stated that the United Kingdom Companies Acts have contemplated investor and creditor protection by financial disclosure, but suggests that this mode of protection only works if the information disclosed can be safely taken as accurate.[53]

In *ICAL Ltd v Country Natwest Securities Australia Ltd & Transfield (Shipbuilding) Pty Ltd*[54] Bryson J made an observation in the case that even though the information had been published by the Minister and had been the subject of news dissemination in newspaper it is not particularly significant as much information in the public domain fails to reach many members of the public. Furthermore it is often difficult for a member of the public to find out the information which had been published while the best informed people may miss some thing.

The Registrar of Companies of the Ministry of Domestic Trade and Consumer Affairs commented that the effectiveness of corporate disclosure is determined by two

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[52] The issuer is required to file Form 44, Notice of Situation of Registered Office and of Office Hours and Particulars of Change; Form 49, Return giving particulars in Register of Directors, Managers and Secretaries and changes of Particulars; Form 24, Return of Allotment of shares etc.

[53] In the Principles of Modern Company Law at p.468.

[54] (1988) 6 ACLC 467 at 480.

main factors ie timing and adequacy. Adequacy deals with the extent and content of disclosure.However adequate and timely corporate disclosure may not be sufficient if updates on the development of any matters of the issuer is not forthcoming. To have effective disclosure of information issuers should provide periodic updates on the development of any of its matters.[55]

It is submitted that the filing of a copy of the issuer's disclosure on the latest developments in the issuer in the Office of the Registrar of Companies should be made mandatory to ensure at all times the matters contained in the prospectus of the issuer is updated and current at all times.[56] The above suggestion is consonance with the principles of the securities laws that there should be full and fair disclosure of all material facts concerning the issuer whose securities are offered to the public.

4.2.4 Dealing In Securities

The provision of mandated information relating to shareholdings are contained in sections 69E, 135(2) and 158 of the Companies Act 1965.

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[55] New Strait Times February 8th 1997.

[56] Each director should also file a statutory declaration of compliance with the Continuing Listing Requirements of the Kuala Lumpur Stock Exchange at the time the issuer forward a report on the latest developments in the issuer.

Under section 69E of the Companies Act a person who is a substantial shareholder shall give notice in writing to the issuer and the Stock Exchange stating his name, nationality, address and full particulars of the voting shares and particulars of its change, if any, within fourteen (14) days after becoming a substantial shareholder. The company shall keep a register of the particulars relating to substantial shareholder filed under section 69E, 69F and 69G at its registered office and the register is open to inspection by any member of the company or member of the public.[57]

Under section 135(2) of the Companies Act a director has to give notice to the company of his particulars relating to his shareholdings and such matters affecting or relating to himself as are necessary for the purpose of compliance by the company of the requirements of the Act within fourteen days after the date on which he become the Director.

The issuer shall under section 158 of the Companies Act keep a register of its members, which shall be prima facie evidence of any matters contained therein, and the said register is open to inspection to any member

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[57] Section 69L of the Companies Act 1965.

or any other person.[58]

It is submitted that to facilitate investigations into any suspected cases of insider dealing, the filing of particulars of shareholdings of both the substantial shareholders and the directors should be done within three days of the date of the event instead of the present fourteen (14) days.

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[58] Section 160(2) of the Companies Act 1965.

CHAPTER 5

PROPOSALS FOR REFORMS TO THE SECURITIES LAWS

5.1 INTRODUCTION

The provisons of the laws of insider trading in the Securities Industry Act 1983 and the Companies Act 1965 and the Listing Requirements in the Kuala Lumpur Stock Exchange are comprehensive and wide-ranging. No doubt the laws on insider trading may be amended to remove the weaknesses in the laws, but the laws on insider trading cannot achieved its goals without effective enforcement and supervision.

It is proposed that to effectively enforce the laws on insider trading, a subsidiary legislation ie. the insider trading regulation such as "The Prohibition Of Insider Trading Order 1997" be made under the Securities Industry Act 1983. The Registrar of Companies has stated in its report on the enforcement of insider trading, that in its enforcement of the laws on insider trading, it is difficult to identify the insiders, who indulged in insider trading using local nominees when the insiders are persons or entities residing overseas.

As a more effective measure, it is proposed that the sales proceeds or the certificates of dealings be seized pending the investigation so that the insiders who are involved, will face financial problems in their dealings, and this may serve as an effective deterrent measure in the enforcement of the laws.

As for each issuer, it is suggested that each issuer should make rules on insider trading based on the policies of insider trading as stated in the Continuing Listing Requirements of the Kuala Lumpur Stock Exchange.

5.2 Insider Trading Regulation 1997.

SECURITIES INDUSTRY ACT 1983

PROHIBITION OF INSIDER TRADING ORDER 1997

In exercise of the powers conferred by subsection _____ of Section _____ of the Securities Industy Act 1983 the Controller of Securities with the approval of the Minister makes the following Rule.[1]

1. This Rule may be cited as the Prohibition of

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[1] Under section 127 (1) of the Securities Industry Act 1983 the Minister may make such regulations to carry out or to achieve the objects and purposes of this Act. This proposal is made under the premise that the Securities Commission should be given the powers under the securities laws to make rules for more effective enforcement of the securities laws.

Insider Trading Order 1997 and shall come into force on the _____.

2. In this Rule unless the context otherwise requires:-

"insider" means any person who has both direct or indirect access[2] to inside information.

"Inside information" means specific information which is not generally available, and if generally available will affect the price of the particular listed transferable securities of a particular listed issuer on the Stock Exchange.

"days" means the market days as stipulated in the Kuala Lumpur Listing Requirements (Main Board).

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[2] Those persons who have direct or indirect access to inside information includes those persons who obtained or received inside information, both directly or indirectly from the insider.This is to provide uniformity with the European Community Laws. This approach to insider trading emphasises the "securities market approach" but should restrict liability for those who has indirect access to inside information by the fiduciary nature of the relationship between the parties.
"Access" is defined in Webster's New Twentieth Century Dictionary Unabridged Second Edition, amongst others, as liberty to approach, come into, or use (with to), often implying previous obstacles.
"Access" is defined in Black's Law Dictionary 6th edition 1990, St. Paul, Minn.West Publishing Co. as access means freedom of approach,or communication, or the means,power or opportunity of approaching, communicating or passing to and from.

3. (a) Every insider is prohibited from dealing in a listed transferable security of a particular issuer during the period of sixty (60) days prior to and or after the date of the release of inside information on the particular issuer by the issuer to the Registrar of Companies.

(b) If the Controller of Securities, The Deputy Controller of Securities, any Assistant Controller of Securities or Inspector of Securities suspect that a person has contravened this order, they may seize the proceeds from the sale or disposal of the persons' securities or the certificate of dealings in securities, as the case may be, during the period in question.

(c) If proceedings are not instituted against the person within thirty (30) days from the date of seizure the sale proceeds or the certificates of dealings in securities, the sale proceeds or the certificates of dealings in securities shall be restored to the person from whom they were seized. If proceedings are instituted against him, the sale proceeds or the certificate of dealings in securities may be forfeited or otherwise disposed of in such manner as the court may direct.

4. Any person who contravenes or fails to comply with any provision of this Order shall be guilty of an

offence against the Securities Industy Act 1983.

Made this day of 1997.

Controller of Securities

Approved this

[Reference:]

Minister of Finance

5.3 The Rules On Insider Trading of the Issuer.

THE CONTINUING LISTING REQUIREMENTS

OF THE

KUALA LUMPUR STOCK EXCHANGE

THE RULES ON INSIDER TRADING

In the exercise of the powers conferred by Article of Articles of Association of the Company, the Board of Directors with the approval of the members at an annual general meeting do hereby make the following Rules.

Part I

Preliminary

1.0 Citation and Commencement

1.1 These Rules may be cited as The Rules on Insider Trading and shall come into force on

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Part II

General Principles

2.0 The Persons engaged in dealings in securities in the company must observe the general principles of these Rules. In areas or circumstances which arises from the course of dealings in securities not explicitly covered by any rule, the general principle of these Rules will apply.

2.1 Shareholders Right To Informed Investment

Shareholders shall at all times have in their possession sufficient information on matters affecting the company to enable them to reach an adequate judgement and decision on the matters. No relevant information shall be withheld from them.

2.2 Limitation on the Director's Dealings in Securities

The Directors should restrict their dealings in securities whilst in possession of inside information.

2.3 Inside Information

All information which arises from the Company must be handled with care, and treated as confidential and secret.

2.4 Disclosure of Information

Only accurate and precise information should be disseminated in a timely fashion. If the company has to make an announcement concerning the securities, and such information relates to predictions or estimates, the company must have reason to believe that it can and will be able to substantiate the predictions or estimates.

Part III

Rules

3.0 The Controlling Officer of the Company shall do all acts and things to ensure that all material inside information relating to matters affecting the Company are disclosed promptly and in a timely fashion to the shareholders and investors at large.

3.1 Each director shall take note of his duties under the common law and his prescribed duties under the relevant statutes. His duties are inter alia:-

(a) The Director should act in good faith, be fair and be loyal when he acts for and on behalf of the Company.

(b) The Director should exercise his powers for a proper purpose, and to avoid actual or potential conflicts between his personal interests and interests of the Company.

(c) The Director should exercise duties of care and diligence and take a diligent and intelligent interest in the matters provided to them.

(d) The Director should be kept informed on the developments in the Company by having information which he believes is necessary and be up to date with the company's financial position. He should seek independent expert opinion when necessary.

(e) The Director should furnish information to shareholders to enable them to make an informed judgement.

(f) The Director of the Company should schedule his purchases or sale of securities of the Company.

(g) The Director should make a statutory declaration of his purchases or sale of securities of the company for a period of 60 days prior to and after the date of declaration of unusual movements in the securities by the Kuala Lumpur Stock Exchange.

(h) The Director should not make use of inside information in his purchases or sale of securities.

(i) The Director should not disclose inside information to any other person and/or procure any other person to purchase or sell the securities of the company.

3.2. In the event that any director is found engaging in or has contravened the securities law, the institutional shareholder should institute civil action to recover damages (if any) caused to the company by the director concerned.[3]

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[3] The rules proposed are self-regulatory rules to be adopted by the issuers as the rules on insider trading in their company. How the issuers implement the rules and imposed the penalty in the event of non-compliance should be left to the issuer. If there is evidence of insider trading being committed by the directors and the institutional shareholders refused to take action against the directors, it is envisaged that there will be an in built mechanism in the system of self-regulation that institutional investors will take action

3.3. If the director is found to be involved in insider trading and such matters is brought to the attention of the company, the company should not hesitate to institute civil suits to claim all losses caused to the company so as to maintain the good name of the company and its reputation for integrity in the securities market.

3.4. All inside information which arises from the company must be treated with strict confidentiality. If there is a necessity to erect Chinese Walls in the company, such walls should be set upon to prevent the flow of inside information to the unauthorised section of the company. If a person (which includes the director, employee, independent contractor or persons under a contract for service with the company) has access to inside information, such person shall be under an obligation of confidence to the company or it may be inferred from the circumstances of the case that he is under an obligation of confidence to the company to treat such information as confidential. In the event of unauthorised disclosure or use or misuse of insider information (as the case may be) the company should institute a civil case of breach of confidence under the common law or file a case of unjust enrichment against

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against all insider dealings. If not, their holdings in the company will diminished in value in the long run when other investors avoid investing in the company in the long term.

a third party.

3.5. It is a rule that the disclosure of inside information by the Company should conform strictly to the Continuing Listing Requirements of the Kuala Lumpur Stock Exchange, that is, only precise specific information relating to the securities should be disclosed. If information relating to estimates or predictions are disclosed, such information should be based on facts which are realisable and do not mislead the investors at large.

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APPENDIX 1

PERTUDUHAN PERTAMA

Pendakwa Raya
lawan

Chua Seng Huat
(Nombor Kad Pengenalan: K64495)

"Bahawa kamu pada 23 Mei 1995 di Sarawak Securities Sdn. Bhd., Wisma Mahmud, Jalan Sungai Sarawak, Kuching, dalam negeri Sarawak, berhubungan dengan perniagaan sekuriti syarikat Kim Hin Industries Berhad (dirujuk terkemudian sebagai "syarikat tersebut"), yakni, berhubungan dengan jualan 1,000,000 unit saham syarikat tersebut (dirujuk terkemudian sebagai "jualan tersebut"), ada maklumat dalam kedudukan kami selaku pengarah urusan syarikat tersebut bahawa syarikat tersebut telah mengalami kerugian kewangan (dirujuk terkemudian sebagai "maklumat tersebut") yang

- jika diketahui umum mungkin dengan munasabah dijangka akan menjejaskan secara material harga hal perkara jualan tersebut dalam bursa saham;

- dipegang oleh kamu sebab kedudukan rasmi kamu selaku pengarah urusan syarikat tersebut;

- adalah munasabah menjangka seseorang dalam kedudukan rasmi kamu tidak menzahirkan maklumat tersebut kecuali bagi melaksanakan dengan wajar fungsi-fungsi yang diberikan pada kedudukan itu; dan

- kamu tahu adalah mamlumat sensitif harga belum diterbitkan berhubungan dengan sekuriti syarikat tersebut;

dan kamu telah menggunakan secara tidak wajar maklumat tersebut untuk memperolehi secara tak langsung faedah bagi syarikat Kim Hin (Malaysia) Sendirian Berhad; dan oleh yang demikian kamu telah melakukan suatu kesalahan di bawah seksyen 90 Akta Perindustrian Sekuriti 1983 dan kamu boleh dihukum di bawah seksyen 91 Akta yang sama."

PERTUDUHAN PERTAMA YANG TELAH DIPINDA

Pendakwa Raya

lawan

Chua Seng Huat
(Nombor Kad Pengenalan: K764495)

Kamu adalah dipertuduh atas arahan Pendakwa Raya dan pertuduhan terhadap kamu adalah seperti berkut:-

"Bahawa kamu pada 23hb. Mei 1995 di Sarawak Securities Sdn Bhd., Wisma Mahmud, Jalan Sungai Sarawak, Kuching, dalam negeri Sarawak, berhubungan dengan perniagaan sekuriti syarikat Kim Hin Industry Berhad (dirujuk terkemudian sebagai "syarikat tersebut"), yakni, berhubungan dengan jualan 1,000,000 unit saham syarikat tersebut oleh kamu, (dirujuk terkemudian sebagai "jualan tersebut") ada maklumat dalam kedudukan kamu selaku pengarah urusan syarikat tersebut, tentang penurunan keuntungan operasi bagi syarikat-syarikat Kumpulan Kim Hin (dirujuk terkemudian sebagai "maklumat tersebut") yang

- jika diketahui umum dengan munasabah dijangka akan menjejaskan secara material harga hal perkara jualan tersebut dalam bursa saham;

- dipegang oleh kamu sebab kedudukan rasmi kamu selaku pengarah urusan syarikat tersebut;

- tidak menzahirkan maklumat tersebut kecuali bagi melaksanakan dengan wajar fungsi-fungsi yang diberikan pada kedudukan itu; dan

- kamu tahu adalah maklumat sentsitif harga belum diterbitkan berhubungan dengan sekuriti syarikat tersebut; dan kamu telah

menggunakan secara tidak wajar maklumat tersebut untuk memperolehi secara tidak langsung faedah bagi syarikat Kim Hin (Malaysia) Sendirian Berhad; dan oleh yang demikian kamu telah melakukan suatu kesalahan di bawah Seksyen 90 Akta Perindustrian Sekuriti 1983 dan kamu boleh dihukum di bawah seksyen 91 Akta yang sama."

PERTUDUHAN PILIHAN

Pendakwa Raya

lawan

Chua Seng Huat
(Nombor Kad Pengenalan: K764495)

Kamu adalah dipertuduh atas arahan Pendakwa Raya dan pertuduhan terhadap kamu adalah seperti berikut:-

"Bahawa kamu pada 23hb. Mei 1995 di Sarawak Securities Sdn Bhd, Wisma Mahmud, Jalan Sungai Sarawak, Kuching, dalam negeri Sarawak, sebagai seorang pegawai syarikat Kim Hin Industry Berhad, berhubungan dengan perniagaan sekuriti syarikat Kim Hin Industry Berhad (dirujuk terkemudian sebagai "syarikat tersebut"), yakni, berhubungan dengan jualan 1,000,000 unit saham syarikat tersebut oleh kamu (dirujuk terkemudian sebagai "jualan tersebut"), telah menggunakan dengan tidak wajar maklumat sulit tertentu, yakni penurunan keuntungan operasi bagi syarikat-syarikat Kumpulan Kim Hin, untuk memperolehi secara tidak langsung faedah bagi syarikat Kim Hin (Malaysia) Sendirian Berhad, dan

- kamu telah memperolehi maklumat sulit tertentu tersebut oleh kerana kedudukan kamu sebagai pegawai syarikat tersebut; dan

- jika maklumat sulit tertentu tersebut diketahui umum, ianya mungkin dengan munasabah dijangka akan menjejaskan secara material harga hal perkara jualan tersebut dalam bursa saham; dan

oleh yang demikian kamu telah melakukan suatu kesalahan di bawah seksyen 89 Akta Perindustrian Sekuriti 1983 dan kamu boleh dihukum di bawah seksyen 91 Akta yang sama."

PERTUDUHAN KEDUA

Pendakwa Raya

lawan

Chua Seng Huat
(Nombor Kad Pengenalan: K764495)

"Bahawa kamu pada 26 Jun 1995 di Sarawak Securities Sdn.Bhd., Wisma Mahmud, Jalan Sungai Sarawak, Kuching, dalam negeri Sarawak, berhubungan dengn perniagaan sekuriti syarikat Kim Hin Industries Berhad (dirujuk terkemudian sebagai "syarikat tersebut"), yakni, berhubungan dengan jualan 200,000 unit saham syarikat tersebut (dirujuk terkemudian sebagai "jualan tersebut"), ada maklumat dalam kedudukan kamu selaku pengarah urusan syarikat tersebut bahawa syarikat tersebut telah mengalami kerugian kewangan (dirujuk terkemudian sebagai "maklumat tersebut") yang

- jika diketahui umum mungkin denganmunasabah dijangka akan menjejaskan secara material harga hal perkara jualan tersebut dalam bursa saham;

- dipegang oleh kamu sebab kedudukan rasmi kamu selaku pengarah urusan syarikat tersebut;

- adalah munasabah menjangka seseorang dalam kedudukan rasmi kamu tidak menzahirkan maklumat tersebut kecuali bagi melaksanakan dengan wajar fungsi-fungsi yang diberikan pada kedudukan itu; dan

- kamu tahu adalah makluma sensitif harga belum diterbitkan berhubungan dengan sekurit syarikat tersebut;

dan kamu telah menggunakan secara tidak wajar maklumat tersebut untuk memperolehi secara tak langsung faedah bagi syarikat Kim Hin (Malaysia) Sendirian Berhad; dan oleh yang demikian kamu telah melakukan suatu kesalahan di bawah seksyen 90 Akta Perindustrian Sekuriti 1983 dan kamu boleh dihukum di bawah seksyen 91 Akta yang sama."

PERTUDUHAN KEDUA YANG TELAH DIPINDA

Pendakwa Raya

lawan

Chua Seng Huat
(Nombor Kad Pengenalan: K764495)

Kamu adalah dipertudah atas arahan Pendakwa Raya dan pertuduhant erhadap kamu adalah seperti berikut:-

"Bahawa kamu pada 26hb. Jun 1995 di Sarawak Securities Sdn Bhd, Wisma Mahmud, Jalan Sungai Sarawak, Kuching, dalam negeri Sarawak, berhubungan dengan perniagaan sekuriti syarikat Kim Hin Industry Berhad (dirujuk terkemudian sebagai "syarikat tersebut"), yakni, berhubungan dengan jualan 200,000 unit saham syarikat tersebut oleh kamu, (dirujuk terkemudian sebagai "jualan tersebut") ada maklumat dalam kedudukan kamu selaku pengarah urusan syarikat tersebut tentang penurunan keuntungan operasi bagi syarikat-syarikat Kumpulan Kim Hin (dirujuk terkemudian sebagai "maklumat tersebut") yang

- jika diketahui umum dengan munasabah dijangka akan menjejaskan secara material harga hal perkara jualan tersebut dalam bursa saham;

- dipegang oleh kamu sebab kedudukan rasmi kamu selaku pengarah urusan syarikat tersebut;

- adalah munasabah menjangka seseorang dalam kedudukan rasmi kamu tidak menzahirkan maklumat tersebut kecuali bagi melaksanakan dengan wajar fungsi-fungsi yang diberikan pada kedudukan itu; dan

- kamu tahu adalah maklumat sensitif harga belum diterbitkan berhubungan dengan sekuriti syarikat tersebut;

dan kamu telah menggunakan secara tidak wajar maklumat tersebut untuk memperolehi secara tak langsung faedah bagi syarikat Kim Hin (Malaysia) Sendirian Berhad; dan oleh yang dimikian kamu telah melakukan suatu kesalahan di bawah seksyen 90 Akta Perindustrian Sekuriti 1983 dan kamu boleh dihukum di bawah seksyen 91 Akta yang sama."

PERTUDUHAN PILIHAN

Pendakwa Raya

lawan

Chua Seng Huat
(Nombor Kad Pengenalan: K764495)

Kamu adalah dipertuduh atas arahan Pendakwa Raya dan pertuduhan terhadap kamu adalah seperti berikut:-

:Bahawa kamu pada 26hb. Jun 1995 di Sarawak Securities Sdn Bhd, Wisma Mahmud, Jalan Sungai Sarawak, Kuching, dalam negeri Sarawak, sebagai seorang pegawai syarikat Kim Hin Industry Berhad, berhubungan dengan perniagaan sekuriti Syarikat Kim Hin Industry Berhad (dirujuk terkemudian sebagai "syarikat tersebut"), yakni berhubungan dengan jualan 200,000 unit saham syarikat tersebut oleh amu (dirujuk terkemudian sebagai "jualan tersebut"), telah menggunakan dengan tidak wajar maklumat sulit tertentu, yakni penurunan keuntungan operasi bagi syarikat-syarikat Kumpulan Kim Hin, untuk memperolehi secara tidak langsung faedah bagi Syarikat Kim Hin (Malaysia) Sendirian Berhad, dan

- kamu telah memperolehi maklumat sulit tertentu tersebut oleh kerana kedudukan kamu sebgai pegawai syarikat tersebut; dan

- jika maklumat sulit tertentu tersebut diketahui umum, ianya mungkin dengan munasabah dijangka akan menjejaskan secara material harga hal perkara jualan tersebut dalam bursa saham; dan

oleh yang dimikian kamu telah melakukan suatu kesalahan di bawah seksyen 89 Akta Perindustrian Sekuriti 1983 dan kamu boleh dihukum di bawah seksyen 91 Akta yang sama."

APPENDIX 11

The subject matter "Management" as shown in each prospectus of the various public listed companies:-

PROSPECTUS OF KWANTAS CORPORATION BERHAD

8.7 Directors, Management Team And Employees

Board of Directors

The following provides a brief profile of the Directors of KCB:

Kwan Ngen Chung, aged 36, is one of the founder directors of the Group and is currently the Group Managing Director and Chief Executive Officer of KCB....

Management Team

The profile of the senior management team of the KCB Group are as follows:

Rajendran A/L C. Thanapalasingam, aged 46, is the Project Manager of KOSB responsible for the management and supervision of the company's refinery....

PROSPECTUS OF BINA PURI HOLDINGS BHD.

7.8 DIRECTORS, MANAGEMENT AND EMPLOYEES

(i) **Dato' Jaafar bin Jamaludin, DSDK**, aged 48, is the **Chairman** of BP Holdings.

Datuk Tee Hock Seng, A.S.D.K., J.P., aged 45, is the **Managing Director** of BP Holdings and was appointed to the Board of BP Holdings on 5 November 1990....

(ii) **Management**

The biref profile on the key management of the BP Holdings Group is set out below:

Cheah Ban Seng, aged 30, is the Group Administration and Financial controller,

primarily responsible for all administrative and financial matters of the Group....

(iii) **Relationship between Directors and Management**

Datuk Tee Hock Seng, Tee Hock Loo, Tay Hock Lee and Tee Hock Hin are brothers....

(iv) **Employees**

As at 31 October 1994, BP Holdings Group employs 323 employees....

PROSPECTUS OF ACP INDUSTRIES BERHAD

7. **Directors of ACP Industries**

(i) **Directors**

Dato' Kamaruddin bin Ahmad, aged 55, has been the Chairman of ACP Industries since 20 October 1994....

(ii) **Senior Management**

Roger Kook Siew Ming, aged 45, is the General Manager (Development) of ACP Malaysia, a position he has held since April 1994....

(iii) **Family Relationship**

None of the above Directors nor Senior Management have any family relationship with one another....

(iv) **Employees**

The ACP Industries Group currently has 409 employees, spread out between its subsidiary companies,....

Family Relationship

Save for Mr. Kwan Ngen Chung, Mr. Kwan Ngen Wah, Ms. Kwan Jin Nget and Ms. Kwan Min Nyet and Madam Kwan Chiew Giok who are brothers and sisters, and Madam Kwan Jin Nget and Mr. Ding Yu chai who are spouses, there are no family relationship among the Directors and management staffs mentioned above....

Employees

As at 30 September 1996, the KCB Group has a total of 966 employees under permanent appointment in various capacities which includes foreign labourers with contractual work permits....